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No. 88-191

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

City of New Orleans;
Blake G. Arata *et al.*, representatives, etc.;
and New Orleans Public Service, Inc.
v.
United Gas Pipe Line Company.

Louisiana Power & Light Company
v.
United Gas Pipe Line Company
and Pennzoil Company.

Nos. CA 3613, CA 3614.

Court of Appeal of Louisiana,
Fourth Circuit.

April 30, 1987.

As Corrected May 13, 1987.

Rehearings Denied Jan. 19, 1988.

Utilities sought to recover against supplier for breach of contracts to deliver natural gas for electric power plants. The Civil District Court, Parish of Orleans, George C. Connolly, Jr., J., entered judgments for utilities, and supplier appealed on liability issue, and utilities appealed on issue of damages. The Court of Appeal, Redmann, C.J., held that: (1) supplier's management of its gas supplies, including releases, acquisitions and sales, however reasonable in other contexts, was not reasonable in context of delivery requirements contained in contracts with utilities to supply natural gas for electric power plants and, notwithstanding national gas shortage, was a contractual breach for which utilities were entitled to recover damages against supplier, and (2) utilities harmed by reason of supplier's breach of its contractual obligation to deliver natural gas to utilities for electric power plants were entitled to respective damage awards against supplier of $89,984,003 and $46,410,925 together with prejudgment legal interest.

Affirmed.

C. Murphy Moss, Jr., Lemle, Kelleher, Kohlmeyer, Dennery, Hunley, Moss & Frilot, New Orleans, W. DeVier Pierson, Pierson, Semmes and Finley, Washington, D.C., John R. Hutcherson, Brunini, Grantham, Grower & Hewes, Jackson, Miss., for United Gas Pipe Line Co.

Charles W. Lane, III, John W. Haygood, R. Patrick Vance, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, Clayton L. Orn, Anderson, Brown, Orn & Jones, Houston, Tex., William C. Nelson, New Orleans, for New Orleans Public Service, Inc.

Donald R. Mintz, Constance Charles Willems, Ellis B. Murov, Pia Conte, McGlinchey, Stafford, Mintz, Cellini & Lang, New Orleans, for City of New Orleans and Blake G. Arata et al.

Andrew P. Carter, Kenneth P. Carter, Terrence G. O'Brien, Monroe & Lemann, New Orleans, for Louisiana Power & Light Co.

Stephen M. Hackerman, Baker & Botts, Houston, Tex., Gene W. Lafitte, Frederick W. Bradley, Liskow & Lewis, New Orleans, for Pennzoil Co.

Marshall B. Brinkley, Gen. Counsel, Louisiana Public Service Com'n, Baton Rouge, Michael R. Fontham, Wayne J. Lee, Paul L. Zimmering, Stephen G. Bullock, Noel J. Darce, Stone, Pigman, Walther, Wittmann & Hutchinson, New Orleans, for Louisiana Public Service Com'n.

Before REDMANN, C.J., and KLEES and LOBRANO, JJ.

REDMANN, Chief Judge.

United Gas Pipe Line Company appeals from judgments for breach of contract damages in favor of Louisiana Power and Light Company for $40,309,142 and New Orleans Pub-

lic Service, Inc. (and the class of persons paying the latter's electric rates during the breach) for $44,403,106. LP & L and NOPSI were obliged by the contracts to buy, and United was obliged to supply to them, their requirements (or part-requirements) of natural gas for electric power plants over periods of up to 25 years. United raises many issues, including whether the trial judge should have been recused; whether the ratepayers have a right of action; whether some damages were wrongly awarded because not caused by its alleged breach; and whether prejudgment interest was wrongly awarded. United's principal argument is that a national gas shortage and governmental distribution orders reduced or excused its contractual delivery obligations, both because the contracts so provide in cases of gas shortage, governmental orders, or force majeure, and because of a variety of other defenses.

The plaintiffs appeal or answer United's appeal (in either case referred to as an appeal) seeking added amounts or items of damages. LP & L seeks judgment in tort against United (as does the class) and against its one-time corporate parent, Pennzoil Company (whose corporate relationship is detailed in *Louisiana Power & Light v. United Gas Pipe Line,* 493 So.2d 1149 (La. 1986)). LP & L also seeks deletion of the judgment's provision for deposit of its award into the trial court's registry until the court rules on a method of distribution to its customers.

We note the intervention on the side of LP & L by the Louisiana Public Service Commission, whose position is akin to that of an amicus curiae, seeking awards only for LP & L. We also note the City of New Orleans's anomalous claim of a right of action (presented in NOPSI's original petition) as the governmental rate-setting body for NOPSI. The briefs of the PSC and of the City and class, in addition to those of the contractual parties, have very much assisted this court in its review of the judgments appealed.

We conclude that the record supports the trial judge's factual conclusion that United did not prove its affirmative defenses for its conceded failure to deliver the contracted gas. United did not prove that, if it had not released gas reserves that it already had (and had acted with reasonable diligence to acquire additional available gas reserves to meet its already existing contractual commitments and had not further committed itself to new sales of gas), the shortage would still have occurred (or to what extent) on its interstate and New Orleans area intrastate pipelines. United did not prove that its actions did not cause its shortage and were not, at the least, a breach of its implied contractual obligations under its contracts to provide gas. We reason that the contractual impairment of deliveries clause does not purport to exonerate United from liability; that the governmental orders would not have been necessary as to United but for United's self-caused shortage; and that the force majeure clause is inapplicable because United did not prove that the shortage was not within its control. We increase the amounts of damages awarded for increased costs of fuel (and purchased electricity) and we add damages for part of the costs of conversion of the generators to oil-burning. We agree that pre-judgment, but not pre-damage, interest is allowable, with La.C.C. 2924 rates on pre-suit damages only from 1980, and in those senses we reduce the interest award. We delete the provision for deposit of LP & L's damages into court, because questions of rebate or rate reduction fall exclusively to the Louisiana Public Service Commission (or the New Orleans City Council, as to Algiers rates) rather than to any district court. We agree that no tort claim is available against United or Pennzoil.

It is undisputed that United did not supply the gas that, unless somehow excused, it was obliged to supply for LP & L's and NOPSI's power plants under the long-term contracts. United is therefore liable for the damages caused by its failure to deliver the contracted gas, unless it proves

that its delivery obligation is reduced or excused by one of its several defenses.

Essentially, all of United's defenses partake of the nature of impossibility of performance because of a nationwide gas shortage and federal commission and court orders adopted because of that shortage. Essentially, the trial court's response, which we deem not manifestly erroneous but supported by the evidence, is that United bound itself to perform its contracts with LP & L and NOPSI, and that United did not prove that it did perform those contracts reasonably and in good faith: did not prove that it acted reasonably, in view of its performance obligations, to acquire and maintain sufficient gas reserves to satisfy its contractual obligations. The trial court's reasoning is that United itself brought about its shortage, which therefore does not exonerate United from liability.

UNITED'S APPEAL

United's arguments on appeal can be grouped into five: (I) the trial judge should have been recused because he was a member of a plaintiff class who would directly participate in the proceeds of judgment; (II) the ratepayers have no right of action for contractual damages from breach of a contract to which they were not parties; (III) liability was imposed on United without any consideration of the effect of the well-recognized gas shortage of the 1970s on United's ability to serve its customers and without reasoned analysis of the prudence of United's management of its gas supplies; (IV) damages were awarded for reductions in deliveries brought about entirely by federal order rather than by United's shortage of gas; and (V) the award of prejudgment interest dating back to the initial claims of the plaintiffs in 1974 and the award of all costs against United were improper.

I. RECUSAL

We have no authority to consider United's argument that the trial judge, because a member of a plaintiff class

of electric ratepayers, should have been recused. Although United cites the later *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed. 2d 823 (1986), the question of recusal in this very case has already been decided, rightly or wrongly, by the Louisiana supreme court: "The motion to recuse is denied on the merits." *City of New Orleans v. United Gas Pipe Line Co.,* 407 So.2d 714 (La.1981). The courts of appeal have no jurisdiction to review decisions of the Louisiana supreme court. La. Const. (1974) art. 5 § 10(A).

II. RATEPAYERS' RIGHT OF ACTION

We also do not decide whether the trial court should have sustained the exception of no right of action aimed at the NOPSI ratepayers, represented by several individuals and the City of New Orleans and the State of Louisiana. The first petition for damages was filed on behalf of the ratepayers and NOPSI together. NOPSI does not complain of sharing its recovery with the ratepayers, and United does not show any post-trail burden resulting from the arguably improper maintenance of the ratepayers' right of action. Also because it is of no concern to United, we change from January 1, 1973 to April 1, 1971, as the class requests, the trial judge's erroneous specification in the judgment of the date from which all electric ratepayers constitute the plaintiff class.

III. THE GAS SHORTAGE AS EXONERATION

That gas in ample quantity was unavailable from 1970 or so is not gainsaid. Beginning in 1968 and continuing through the 1970s, nationwide gas reserves declined as usage exceeded additions. But the shortage did not produce the results United claims by its many defenses, some of which overlap (as do this opinion's discussions).

III(a). INDUSTRY CONDITIONS AND UNITED'S ACTIONS

United's basic contention is that it did seek to perform, reasonably and in good faith, its contractual commitments;

that its purportedly imprudent or improvident management decisions were in fact reasonable and blameless, given the conditions existing at the time and the knowledge available at the time, including the expectations regarding the size and accessibility of underground reserves of natural gas. The genuine shortage of natural gas during the 1970s in Louisiana and throughout the nation, United claims, was unforeseeable and beyond the control of any individual pipeline company.

The trial court concluded that United's management of its gas supplies, including releases, acquisitions and sales, was imprudent and constituted the sole cause of its shortage. United claims that the trial court's evaluation of United's conduct was flawed because the court did not identify what was imprudent, based its findings on a purely retrospective analysis, and ignored the practices and expectations of the pipeline industry.

United claims that its expectations about the future availability of natural gas were reasonable and consistent with industry expectations; that it had no reason to believe in the period of 1960-66 that it faced a possible shortage. United asserts that it first became aware of possible peak-day shortages in 1969, and that its maintenance of its gas reserve inventory was reasonable and responsive to changing supply and market conditions.

United contends that it could not reasonably maintain the reserves it had because its contracts obliged it to take certain proportions of production annually or else pay for them, and that increasingly high levels of penalty payments for failure to take the contracted gas, caused by its inability to increase sales meaningfully until 1965, coupled with the continual increase in proved reserves in take-or-pay fields boding yet higher penalties, made it impossible for United to maintain existing reserves or make major new gas acquisitions for its interstate system until after 1965. In late 1965 and early 1966, as its system-

wide oversupply problems were in the process of being resolved, United contends it recommenced the acquiring of major new reserves.

United asserts that it was not until 1970, when it began to experience a sudden unavailability of new reserves, combined with continued delays in the construction of an ambitious offshore project and unforeseen downward revisions of estimates of its remaining reserves, that United realized that it would not be able to get sufficient new reserves to avoid some system-wide curtailments.

Another element contributing to United's predicament was that customers varied their level of takes during the year, at differing percentages of their maximum contract levels. The ratio of actual deliveries to the maximum contract limit is known as the annual load factor. The load factor of United's pipeline customers increased from 81% in 1965 to 94% in 1969. United's power plant customers also increased their load factors. United claims that the increases within existing maximum daily quantities under contracts were not predicted by customers or by United. According to United, new or enlarged commitments entered into after Jan. 1, 1968, account for less than 1% of total sales (excluding sales by facilities transferred to Pennzoil) during 1968-1970, and, by comparison with increasing load factors and other problems (increased sales on prior contracts were 14% of total sales), new sales were not, as the trial judge had found, a significant factor in its ultimate curtailment of deliveries.

In short, United contends that when considered in light of the problems it had to address, the information available to it at the time, and the accepted industry custom and practice, United's business decisions regarding the management of its gas supplies were reasonable and designed to ensure adequate supplies for United's customers.

We conclude, as amplified in the discussion below of United's more particularized defenses, that United's ac-

tions, however reasonable in other contexts, were not reasonable in the context of firm requirements contracts, because they did not constitute a reasonable effort to perform those contracts, especially in their implied obligations to have and maintain, or to acquire, at whatever cost, the gas necessary to fulfill the explicit delivery obligations.

On its New Orleans intrastate line, which supplied LP & L's Ninemile Point plant and NOPSI, for example, in the years 1962 through 1969, United released massive reserves of gas under contract. These releases were the result of United's contractual attempts (some allowing the producer the right to cancel United's rights) to avoid costly and escalating penalty payments, under "take or pay" contracts, for failure to take gas as United had contracted to do. By these releases, United lost reserves of some 2,063 billion cubic feet (Bcf) between 1962 and 1969 (and in 1967 shifted another 269 Bcf to an interstate system) from its New Orleans intrastate line. Annual sales from that pipeline in 1968 and 1969 were about 150 Bcf. The released reserves would have provided gas at that rate for over 13 years. (NOPSI's claim covers only about five years. While LP & L's Ninemile contract extended some 17 years at determinable prices, the delivery obligation actually decreased from 100% of requirements for the existing three generators to a third of requirements for those plus a planned fourth, once the fourth began operation. This decrease reduced the contractual daily maximum from 125,000 to 80,000 thousand cubic feet (Mcf). 17 years of reduced delivery would have roughly equalled 13 years of the original delivery.) The primary reason gas was not provided to Ninemile and NOPSI—the reason there was a "shortage"—was that United released those reserves notwithstanding its contractual obligations to supply gas.

The releases of those reserves (over half to Humble Oil as a result of an "omnibus agreement" of October 1, 1962) had business considerations as their purpose, and in that sense may well be described as reasonable. United's con-

tract for one of the largest fields enabled the producer to cancel if United did not take 25% of the field's production capacity for two years, and United did not take that quantity despite a price reduction aimed at increased consumption. Other contracts included "take or pay" provisions that obliged United to pay for specified minimums based on reserves even if not taken. Those provisions cost United $754,702 in 1960 and $6,776,068 in 1961 (and were expected to cost more as additional reserves in the contracted fields were discovered). United argues that its releases of reserves were reasonable responses to problems such as these. One may well accept that reserve releases were reasonable for United's purposes, but the releases, and the intrastate system shortage they caused, simply were not beyond United's control—as is required for the applicability of the contract's force majeure provision and the Civil Code's impossibility defense.

United's conversion of the New Orleans intrastate system into part of the interstate system (by injecting interstate gas), United argues plausibly, was more beneficial than harmful to intrastate system customers in that the gas that had been still attached to the former intrastate system (after the releases) was used in that lower-pressure ("locked-in") system only, which also received additional gas from the higher-pressure remainder of the interstate system. Also plausible is that United's sales to new intrastate system customers would, by themselves, not have created any problem for old customers (had the releases not occurred).

Even so, United's efforts as a whole to deal with (to escape) increasing costs of performance do not constitute good faith performance of its obligations, explicit and implicit, under its gas delivery contracts.

Thousands of times greater by absolute count, although less dramatic in proportion to usage, were the releases affecting United's interstate system, which served LP &

L's Sterlington plant near Monroe. That system's annual usage was about 1,300 to 1,500 billion cubic feet between 1960 and 1968, with a growth trend of over 3% a year and with a total usage during that period of about 12,454 Bcf. During that period United released almost 4,590 Bcf while adding only about 4,083 Bcf. Thus, over that nine-year period, that system suffered a continuing and increasing decline of reserves of over 1,300 Bcf a year from usage plus a slight further decline because additions to reserves were more than offset by releases of reserves. Had reserves simply been maintained at the 1960 level, United could have met its delivery obligations under its contracts for well beyond another nine years. LP & L's Sterlington contract only ran about eight years from the first curtailment. The record shows that there was no gas shortage in the early 1960s, and the trial judge's conclusion was therefore reasonable that United could have acquired additional reserves that, coupled with the reserves it released, would have maintained its reserve position and its ability to fulfill its contractual obligations over the lives of the contracts at issue. United does show that take-or-pay costs and other considerations prompted its business decisions, but increased costs to perform do not excuse nonperformance of contracts. In perspective, penalty prepayments for gas of $7,000,000 a year (or their balance of $15.3 million by 1963 or even $21.3 million by 1965) to assure ability to comply with its contracts, although truly a substantial amount of money, are not so excessive a "prepayment [of] working capital" (as the Federal Power Commission deemed them) as to justify nonperformance by an enterprise whose annual sales of 1,300,000,000 thousand cubic feet of gas, if all sold at a minimum price of $.175 per Mcf (its 1956 contract prices for LP & L were from $.175 to .745) would bring annual gross income of $227,500,000.

III(b). CONTRACT CONSTRUCTION

United argues (and the trial court agreed) that the contracts authorize certain curtailments, and that those curtailments would therefore not constitute a breach of the contracts. United argues that the trial court erred, however, by improperly identifying the circumstances authorizing curtailments and by finding that those circumstances were not present.

In particular, United argues that the "impairment of deliveries" clause should operate to allow curtailments without liability if a shortage exists, provided only that the shortage was not brought about through United's bad faith. The trial court ruled that in addition to there being a shortage, the shortage has to be the result of force majeure and United has to have "prorated its gas supplies between its customers in the order of priorities enumerated," before the impairment of deliveries clause would reduce or suspend United's delivery obligations. United argues that its curtailment priorities differed from those enumerated only because federal commission curtailment orders required curtailment priorities as mandated under the Natural Gas Act and that those orders superseded contract priorities because of the contracts' "duly constituted authorities" clause. Furthermore, United claims that the impairment of deliveries clause is not dependent on the "force majeure" clause, but is intended to be operative with respect to any system-wide shortages that would impair deliveries. Finally, United argues that the trial court erred in determining and applying the appropriate fault standard under the impairment of deliveries clause.

Impairment of Deliveries

Except for a 1974 amendment of the LP & L Sterlington plant contract that preserved LP & L's rights theretofore and is not of concern thereafter, the impairment of

deliveries clauses in the contracts were similar in substance to that here reproduced:

> "Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers shall first be supplied by Seller and next the gas requirements of public utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied, and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers."

(The earlier Sterlington contract provided that "requirements of gas utilities selling gas to domestic consumers and . . . power plants using gas for generation of electricity . . . sold to domestic consumers shall first be supplied . . ., and the remaining available gas shall be prorated by Seller among its other consumers.")

United complains that the trial judge erred in construing the impairment of deliveries clauses as excusing delivery only if prevented by force majeure and then only if the clauses' priorities are followed. (An overlapping defense, discussed below, is that supervening federal orders set other priorities.)

United argues that the contracts contain entirely separate clauses on force majeure, to which the impairment of deliveries clause makes no reference. Most persuasive is that, during contract negotiations, United refused LP

& L's request to expressly limit the impairment of deliveries clause to force majeure conditions.

We agree that the impairment clause was intended to apply in all situations, and not only in force majeure conditions. Any shortage, for any reason, triggers operation of the impairment clause. For example, a former president of United testified that United would prorate deliveries in accordance with the impairment clause in case of a shortage clearly caused by a United employee's negligence. It appears to us indisputable that the impairment clause in such a situation would entitle the power plants to gas before "other consumers" (save domestic consumers).

The universal applicability of the impairment clause in cases of shortage does not, however, mean universal nonliability in cases of shortage. If every shortage excuses delivery obligations, the force majeure clause becomes meaningless. The contract to supply requirements becomes instead a contract to sell whatever is available.

The impairment of deliveries clause simply does not purport to address the question of whether a "shortage" reduces or eliminates United's contractual obligations. All that the impairment clauses in United's gas sales contracts say is that, in case of shortage, gas will go first to domestic gas users, then to domestic electricity users (through power plants), and then to other users. As the contractual characterizations buyer and seller indicate, United contracted not merely to transport gas over its pipelines, but to sell as well as deliver gas to LP & L and NOPSI.

The general rule of contract law is that contracts are enforceable and "have the effect of laws on those who have formed them," requiring their performance "with good faith." La.C.C. 1901 (1870). These contracts expressly made firm delivery commitments (unlike some industry contracts for "interruptible" delivery). The impairment of deliveries clauses therefore cannot be construed to mean that these gas contracts are simply not

enforceable whenever, despite its contractual agreement to supply power plant requirements, United does not have sufficient gas to perform them. Those clauses cannot be construed to excuse nondelivery in the case of a shortage that United could have avoided by reasonable foresight and good faith performance of the implied obligation to maintain (or acquire) sufficient quantities of gas to meet LP & L's and NOPSI's contractual entitlements. The LP & L Sterlington and NOPSI contracts both represented that United "has a supply of gas available for delivery to Buyer and is willing to sell and deliver . . . in the quantities as hereinafter provided."

We find no manifest error in the trial judge's finding that United did not exercise the reasonable foresight that good faith performance of its contracts required. To the contrary, the evidence is that, for business reasons aimed not at performance of its contracts but at saving costs, United released substantial reserves, which would have met then-current needs for several years, and did not acquire others at a time when at least some could have been acquired, and increased delivery commitments by additional sales despite declining reserves. We repeat that it was United's burden to prove its defenses, and United's proof does not demonstrate error in the trial judge's basic conclusion that, on both its interstate and intrastate pipelines, the exercise by United of reasonable foresight, in an effort at good faith performance of the contractual obligations it had already undertaken, long before the national gas shortage, would have enabled United to perform these contracts.

Force Majeure

The contracts also contained force majeure clauses, which suspended the obligations of a party when "rendered unable wholly or in part by force majeure to carry out its obligations. . . ." The contracts define force majeure as

"acts of God, strikes, lockouts or other industrial disturbances, acts of public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, the necessity for making repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome. . . ."

The trial judge's factual conclusion, reasonably supported by the record, was that by the exercise of due diligence, in not releasing reserves, in acquiring reserves when it could have done so, and in not committing itself to further deliveries by added sales atop its preexisting contractual obligations, United could have prevented the shortage that its own actions caused. In such a factual situation, the force majeure clauses by their own definition do not apply and therefore did not suspend United's obligations.

Duly Constituted Authorities

The contracts also contained "duly constituted authorities" clauses: "This agreement is especially made subject to all present or future valid rules, regulations or orders of any commission or regulatory body having jurisdiction."

There is only one essential thing that must be said about the federal orders adopted to cope with the shortages of gas that developed on United's interstate and its Louisiana intrastate pipelines. The essential thing is that those orders did not expropriate any of United's gas or otherwise prevent United from using whatever gas it had to make de-

liveries to its customers. Those orders are not the cause of United's failure to meet its contractual delivery obligations to its customers, including LP & L and NOPSI. Those orders did no more than establish, because United could not supply all of its customers, a priority among its customers in entitlement to the gas that United did have.

United argues persuasively that the priorities established by the federal orders superseded the priorities established by the contractual "impairment of deliveries" clause. That argument affords United no escape from liability, however, because the trial judge's reasonably supported factual conclusion is that there would have been no shortage at all, and no reason for any impairment of deliveries according to either federal or contractual priorities, had United rendered the performance over the preceding years to which its earlier contracts obliged it.

III(c). FEDERAL INTEREST

United argues, as an argument apart from the duly constituted authorities contractual argument immediately above, that there is a federal interest that curtailments be uniform, nondiscriminatory, and in accordance with the objectives of the Natural Gas Act; that state law breach of contract liability is preempted by that interest (embodied in federal orders and tariffs), except, at most, in case of a pipeline's fault determined by federal standards of willful misconduct or reckless disregard of contract obligations.

The trial court concluded that federal curtailment orders and tariffs would not exculpate United from contractual liability for curtailments in the instant cases because United's shortage "was induced by the unrealized expectations and imprudent decisions of United and its management." United argues that the fault standard for determining whether exculpation lies under United's tariff and Commission orders is a federal fault standard, and

that the federal standard is willful misconduct or reckless disregard of the pipeline's service obligations.

United does not cite any authority establishing this separate "federal interest" argument. We conclude that it is inconsistent with the expressions of cases like *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976); *International Paper Co. v. Federal Power Com'n*, 476 F.2d 121 (5 Cir. 1973); *Monsanto Co. v. Federal Power Com'n*, 463 F.2d 799 (D.C.Cir.1972); and *Texasgulf, Inc. v. United Gas Pipe Line Co.*, 610 F.Supp. 1329 (D.C.D.C.1985). These cases support the view that, notwithstanding that federal orders or tariffs may override any state law liability akin to strict liability or liability without fault, breaches of contract not only by willful misconduct, but also by negligence or lack of due diligence, are governed by state law standards. This defense seems to be no more than a restatement of the "duly constituted authorities" clause defense discussed earlier, and we deem it equally insufficient to avoid United's liability.

III(d). LOUISIANA CODE DEFENSES

United also argues that the trial judge erred in rejecting its separate defenses, under the Louisiana Civil Code, of fortuitous event or irresistible force, failure of cause, error as to motive, and implied condition.

Fortuitous Event

United contends that the nationwide gas shortage was a "fortuitous event or irresistible force" within C.C. 1933(2) (1870). United cites cases of performance excused by flood (*Viterbo v. Friedlander*, 120 U.S. 707, 7 S.Ct. 962, 30 L.Ed. 776 (1887) and very heavy rainfall (*Davis v. Tillman*, 370 So.2d 1323 (La.App. 2 Cir. 1979)). But those were not cases in which, for example, a contractor was held not liable for the failure of a flood-wall or roof because of flood or rain—that is, was exonerated by the occurrence of the risks that his contract undertook to protect against.

United's contracts undertook to provide gas requirements over specified periods of many years and, by necessary implication, to do what was necessary to have the gas to be able to provide it. Had United done the necessary, there would have been no "fortuitous" shortage on its lines here involved. United's fortuitous event or irresistible force defense, C.C. 1933(2) (if applicable despite United's arguably "active" breach, C.C. 1931, by release of reserves), is not different in substance or in result from its contractual force majeure defense.

Lack or Failure of Cause; Error; Condition

United also argues that there was a lack or failure of cause in the contracts in question and therefore they can have no effect; that the error of the parties in assuming the continued availability of natural gas was an error as to the principal cause, thereby vitiating consent to the contracts; and that the availability of gas was at least an implied condition of the contracts.

United argues that civil law "cause," C.C. 1893 (1870) (largely analogous to common law consideration), for United's obligation to deliver LP & L's and NOPSI's requirements was lacking or failed. United cites art. 1897's declaration that a contract is without cause "when the consideration for making it was something which, in the contemplation of the parties, was thereafter expected to exist or take place, and which did not take place or exist." Art. 1897 itself exemplifies its meaning: "A gift in consideration of a future marriage is void by this rule if the marriage does not take place." The record suggests that United, in failing to put itself into a position of ability to perform its long-term contracts, may have relied on a "contemplation" that gas would always be available; but it does not suggest that LP & L and NOPSI, in obtaining firm 20-year contracts for requirements, relied on that contemplation. That is not the tenor of the contracts. United did not contract only that, as long as gas were

freely available, it would transport it through its pipelines to LP & L and NOPSI. United's argument from art. 1897 would transform United's obligation from one to supply requirements into one to supply what it might have available, and that was not the intent of the contracts. The utility companies did not commit themselves to buy the contracted requirements exclusively from United for 20 years for the "principal cause" that gas was assumed to be readily available, nor in exchange for a conditional obligation that United would ~~sell if~~ gas were available. The utilities committed themselves to buy exclusively from United for the described contract prices in exchange for United's commitment that it would have and deliver gas. The utilities' commitment was the cause for United's obligation (not conditioned on the availability of gas), just as United's commitment was the cause for the utilities' obligation. The contracts were ordinary requirements contracts that are not invalid for lack or failure of cause or consideration.

IV. CAUSATION OF CERTAIN DAMAGES

IV(a). FEDERAL ORDERS

United argues that the major part of the reductions in deliveries for which damages were awarded was caused by federal order eliminating the power plant preference of the contractual clause on curtailment of deliveries, rather than by United's shortage of gas. United claims that orders of the federal government required United to take gas that it actually had and deliver it to other customers. In January 1973, FPC Opinion No. 647 in United's curtailment case ordered United to immediately eliminate the power plant preference from its curtailment tariff because of the nationwide gas shortage. As a consequence, United argues that 80% of NOPSI's requirements and 50% of LP & L's requirements fell to the lowest curtailment category and United could not legally reinstate the power plant preference. Accordingly, United claims it is not liable for

alternative fuel costs caused by the federal abolition of the power plant preference because those costs were not the immediate and direct result of United's alleged breach of contract. United contends that even with the shortage, most of plaintiffs' damages would not have been incurred if the FPC had not eliminated the power plant preference. Furthermore, United argues that the FPC and federal court orders abolishing the power plant preference constituted a fortuitous event or irresistible force under C.C. 1933(2), which prevented United from supplying gas. In addition, United asserts that the FPC and federal court orders preempt state court damage awards for curtailments resulting from abolition of the power plant preference. United therefore argues that NOPSI's and LP & L's damages should be reduced by the amount attributable to the elimination of the power plant preference.

Much of this argument, to repeat, overlaps earlier arguments. As we have analyzed it earlier, the curtailment clause did not exonerate United of liability in case of shortage, but merely provided a priority of distribution that would cause other customers to suffer the damages rather than power plants. Federal orders eliminating the power plant preference may be characterized as causing the power plants to be the damaged plaintiffs, rather than other customers, irrespective of the extent to which United's shortage may have contributed to the federal commission's orders. But some customers were, inevitably, bound to be damaged by United's failure to perform its contractual obligations to procure and have sufficient gas to comply with its commitments. For that reason, we cannot conclude that the federal orders alone caused the damage, nor that United was without precedent "fault" within C.C. 1933(3) if the federal orders were deemed a fortuitous event or irresistible force.

Nor can we deem the damages from United's breach not "contemplated" by the contract, C.C. 1934(1), or not the "direct and immediate result" of the breach, C.C.

1934(2) (a limit on damages from bad faith breach and, *a fortiori*, on damages from simple breach). Our analysis is that the contract obliged delivery and the failure to deliver inescapably caused the damages awarded. Those damages were, in our opinion, unavoidably contemplated by the parties at the time of the contract. Similarly, the federal orders, although pertinent to whether the failure of delivery constituted a breach, do not negate the obvious conclusion that the failure to deliver directly caused the damages awarded.

We therefore find no error in the trial court's rejection of the federal orders as a defense.

IV(b). OTHER DAMAGES

United claims that in addition to the award of alternative fuel damages for costs directly attributable to the FPC's elimination of the power plant preference, the trial court erred, first, in awarding damages for that portion of United's curtailments that were caused by the nationwide gas shortage, rather than by any fault of United; second, in awarding damages for alternative fuel costs at prices in excess of those reasonably contemplated by the parties at the time that pertinent contracts were executed; and third, in awarding damages to LP & L for increased maintenance and increased operating costs.

The first disputed award we deem sufficiently treated in discussing the arguments from the national gas shortage.

As to the second, we agree that the parties may not have expected a cost so high for replacement fuel, but they inescapably contemplated that failure to deliver the contracted fuel would necessitate (or at least justify) acquiring fuel elsewhere at market prices at the time of the breach. That the market was higher than foreseen does not mean that the contract is unenforceable, nor that its breach should not render the nonperformer liable for the

contemplated result of the breach. See Litvinoff, *Obligations*, II, § 192 (Louisiana Civil Law Treatise, vol. 7), reviewing the Louisiana and French "traditional doctrine [that] the distinction between foreseen and unforeseen damages merely relates to the cause and not to the amount or quantum of the damages." (Litvinoff notes that arguably contrary modern French decisions treat losses of luggage containing "expensive jewels, or unusual lace, or even a valuable manuscript, which are not habitually carried in such a manner.")

As to the third disputed award, United's expert agreed that maintenance and operating expenses increase when burning oil instead of gas. United argues, however, that LP & L did not prove the amount of the increase in these expenses attributable to United's failure to deliver gas, and United therefore seeks reversal of the awards for these items. The trial judge's awards adopted the figures provided by United's proposed findings of facts. United's proposals were that, by eliminating damages "for periods when oil burns were not the result of United's curtailments," maintenance cost increase would be $208,532 (when "based on actual oil usage") and operating cost increase would be $289,676 (also eliminating "salary costs for personnel who were not engaged in burning oil"). The trial judge evidently relied upon the testimony of United's expert Nathaniel Hughes, whose career included 35 years with the Tennessee Valley Authority, ending as chief executive officer of its power department. These awards against United are therefore supported by the record. (We hereinafter consider the argument in LP & L's appeal that these awards were inadequate.)

V. COSTS AND PREJUDGMENT INTEREST

United argues that the trial court erred in its award of costs and prejudgment interest to the plaintiffs.

V(a). COSTS

As to costs, United argues that, in view of the complexity of the cases and the disposition of the parties' claims, the trial court should not have assessed all costs against United; rather, each party should have borne its own costs.

In part, we agree. La.C.C.P. 1920 provides:

> "Unless the judgment provides otherwise, costs shall be paid by the party cast. . . .
>
> "Except as otherwise provided by law, the court may render judgment for costs, or any part thereof, against any party, as it may consider equitable."

United was indeed the "party cast," in respect to the majority of the claims (if not of the majority of the amount in each). But as to some unsuccessful claims LP & L and NOPSI must be counted as the "party cast," and should bear the costs attributable to those claims and to their contribution to the 42,000-page transcript. We see no equitable basis to make United pay the costs reasonably attributable to unsuccessful claims against it. We grant some relief to United in our decree, in a rough-justice apportionment considering all claims.

V(b). PREJUDGMENT INTEREST

Against prejudgment interest, United argues: (1) C.C. 1935 and 1938 and the Louisiana decisions limit prejudgment interest to cases where the object of performance is the payment of money; (2) prejudgment interest should not be awarded from judicial demand because the amounts of damages were not ascertainable at that time; (3) prejudgment interest should in no case have been awarded from judicial demand because demand was made before some of the damages awarded were incurred; and (4) prejudgment interest should not have been awarded at the escalating rates provided by amendments of C.C. 2924 subsequent to the 1974 judicial demands in these cases.

(1) Interest on Damages for Breach of Nonmonetary Obligation

Entirely independent of the meaning of C.C. 1935 and 1938, one may conclude, with United, from the nature of interest as money, that a contractual obligation to deliver gas cannot bear interest as such. One may further conclude that, as shown by art. 1934, damages from the breach of such an obligation are measured, instead, by the creditor's losses, including loss of profit.

Art. 1934 nevertheless provides, in cases of breach of a nonmonetary obligation, a monetary obligation to pay damages. Art. 1934(3) measures damages for breach of a nonmonetary obligation in terms of "pecuniary loss, or the deprivation of pecuniary gain." We agree with United that this monetary obligation arising from breach is not an explicit contractual obligation to pay money; that it is not (as United especially argues, citing Litvinoff, *op. cit,* II § 179) a transformation of the explicit contractual obligation to deliver gas. We further agree with Professor Litvinoff, however, as United's opponents emphasize, that "the obligation to pay damages 'perpetuates' the contract, . . . [and] is owed by virtue of the contract . . . [wherefore] such an obligation also binds the surety. . . ." The question before us at this point is whether this monetary obligation, not explicitly stated in the contract but nonetheless contractual in origin, bears interest.

Art. 1935

United argues not only that the obligation to deliver gas does not bear interest, but that C.C. 1935 (1870) limits interest to (the breach of express contractual) obligations to pay money. That argument begs our question by reading art. 1935 backwards. The article declares, in substance, that in all cases damages for breach of monetary obligations are interest; it does not declare that in all cases interest is damages for breach of (express contractual) monetary obligations. It limits claims for breach of (ex-

press contractual) monetary obligations to interest; it does not limit interest to such claims. Art. 1935 (1870) reads:

> "The damages due for delay in the performance of an obligation to pay money are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more."

The context of art. 1935 is set by art. 1934's measure of damages from breach of nonmonetary obligations, declared to be the loss sustained and the profit denied (with modifications). Art. 1935's intent, to substitute interest for those damages, is thus even more clear from that context. Art. 1935 does not support United's position.

Art. 1938

United makes a similar argument from C.C. 1938 (1970)'s provision that "All debts bear interest . . . from the time they become due, unless otherwise stipulated." United argues that only (explicit contractual) monetary obligations bear interest, citing law dictionary definitions of debt as a sum of money due by express agreement. The Louisiana Civil Code does not so limit its concept of debt. Arts. 2131-2138 (1870) show the breadth of its concept:

> "Art. 2131. By payment is meant, not only the delivery of a sum of money, when such is the obligation of the contract, but the performance of that which the parties respectively undertook, whether it be to give or to do.
>
> "Art. 2132. He who is bound to do, or not to do, or to give, is indifferently called the obligor, or the debtor; and he to whom the obligation is made is in like manner without distinction called the obligee or the creditor.
>
> "Art. 2133. Every payment presupposes a debt. . . ."

(See also art. 3556, subds. (20) and (21), equating obligee with creditor and obligor with debtor.)

Art. 2131 shows that, under the Louisiana Civil Code, payment includes performance of nonmonetary obligations; and art. 2133 shows that such a performance "presupposes a debt." Together these articles show, as do arts. 2132 and 3556 in identifying debtor with obligor and creditor with obligee, that "debt" is as broad in meaning as "obligation" is, under the Louisiana Civil Code.

Our conclusion is that art. 1938's provision that debts bear interest from the time they become due is applicable to debts owed as damages for breach of a nonmonetary contractual obligation, unless some other law prevents its application.

Louisiana Decisions

United relies on *Sugar Field Oil Co. v. Carter,* 214 La. 586, 38 So.2d 249 (1948), and *Quinn Construction Co. v. Savoie,* 207 So.2d 229 (La.App. 4 Cir.1968), *cert. denied* 252 La. 117, 209 So.2d 42 (1968). *Sugar Field* explains its refusal of prejudgment interest in a quantum meruit case thus:

> "The plaintiff prayed for interest from date of judicial demand. The recovery in this suit is predicated on quantum meruit. It is, therefore, an unliquidated claim. Under Article 554 of the Code of Practice [1870] 'interest at the rate of five per cent shall be allowed on all *debts* from the time they become due, unless otherwise stipulated'. (Emphasis ours.) It is true that interest is permissible from date of judicial demand in all ex delicto suits but this is purely statutory—see Act No. 206 of 1916, § 1. In this suit the district judge correctly allowed interest from the date of judgment. On that date the claim had become certain and liquidated by reason of the judgment. *Connette v. Wright,* 154 La. 1081, 1090, 98 So. 674 [1924]."

If *Sugar Field* is not directly in point because an action in quantum meruit, United argues, its reasoning that interest was not recoverable because the claim was not liquidated is nevertheless controlling.

Quinn, supra, applied *Sugar Field's* reasoning in a claim by a contractor against a fired subcontractor for the contractor's excess cost of completing the subcontract. *Quinn* added that an unliquidated claim "cannot become absolutely ascertainable until fixed and determined by the court in its judgment." 207 So.2d at 234. A claim for excess cost of completion is essentially a claim for damages for breach of contract, and *Quinn* may therefore be deemed supportive of United's position.

The supreme court's latest decision in this area is *Alexander v. Burroughs Corp.,* 359 So.2d 607 (La.1978). *Alexander* is a bad faith redhibition case, and it (like the quantum meruit case of *Sugar Field*) may therefore be deemed not directly controlling. It does, nevertheless, point out the problem faced by a Louisiana court in deciding whether prejudgment interest should be awarded. *Alexander* observes:

> "The decisions involving interest on sums recovered by suit are naturally myriad and because of their great number, if for no other reason, inconsistent. There is, however, a thread of consistency among the cases. Article 554 of the Louisiana Code of Practice of 1825 provided that interest should not run on accounts or unliquidated claims, but was repealed by La.Acts. 1839, No. 53 § 1. This Court once commented,
>
> > " 'We have uniformly held that, since the passage of that act, all sums due on contracts bear interest from judicial demand, even where none has been stipulated, and the demand is unliquidated.' *Sullivan v. Williams,* 2 La. Ann. 876, 878 (1847).
>
> See also *Petrie v. Wofford,* 3 La.Ann. 562 (1848); *Calhoun v. Louisiana Materials Co.,* 206 So.2d 147, 151-

52 (La.App. 4th Cir.1968), writ denied, 251 La. 1050, 208 So.2d 324; and *Friede v. Myles Salt Co.*, 177 So. 105, 108 (Orl.La.App.1937)." 359 So.2d 613.

Calhoun was a suit by an employee for a portion of the employer's net profits, as provided by the employment contract. The court of appeal amended the judgment to grant interest from the date each year the payment was due, rather than only from judicial demand, reasoning "interest is recoverable on claims arising ex contractu from the time they become due, whether they are liquidated or unliquidated," citing *Friede*.

Friede alone of the cases *Alexander* cites gives an extended analysis of the problem. Itself an action for professional services, *Friede* notes that its plaintiff's entitlement "must be determined on a quantum meruit basis." 177 So. at 107. The court nevertheless awarded interest from the date of plaintiff's bill—that is, even before judicial demand. The court reasoned:

> "Counsel for plaintiff argues that legal interest should have been allowed from the time at which the debt became due. . . . This argument is based on article 554 of the Code of Practice [1870] and on article 1938 of the Civil Code [1870]. But counsel for defendant maintain that the claim, until judgment was rendered, was an unliquidated one, and that, therefore, interest should be allowed only from judicial demand.
>
> "We note that prior to 1839, interest was not allowed on accounts or unliquidated claims. Until that time, article 554 of the Code of Practice of 1825 provided that: 'No interest shall be allowed on accounts or unliquidated claims.' We deem it significant that by Act No. 53 of 1839 that provision was repealed. Now, apparently as a result of Act No. 181 of 1852, the article reads as follows: 'Interest at the rate of five per cent. shall be allowed on all debts from the time they become due, unless otherwise stipulated.

"The Civil Code provision on the subject has sustained a similarly significant alteration. Article 1932 of the Code of 1825 provided that: 'In contracts, which do not stipulate for the payment of interest, it is due from the time the debtor is put in default for the payment of the principal, and is to be calculated on whatsoever sum shall be found by the judgment to have been due at the time of the default.'

"However, that article (1932) of the former Code has now become article 1938 of our present Civil Code, which reads as follows: 'All debts shall bear interest at the rate of five per centum per annum from the time they become due, unless otherwise stipulated.'

"It is obvious that both changes indicate an intention that interest shall be allowed on unliquidated, as well as on liquidated, claims, and that interest shall commence to run at the time the debt becomes due, regardless of putting in default.

"Act No. 106 of 1916, providing 'that legal interest shall, hereafter, attach from date of judicial demand, on all judgments, sounding in damages, "ex delicto" ' has no application, for, by its own terms, it controls only '* * * judgments, sounding in damages, "ex delicto." ' " 177 So. at 108.

In *Pease v. Gatti,* 205 La. 949, 18 So.2d 511, 513 (1944), quoting that same passage from *Friede,* the supreme court awarded interest on an unliquidated damage claim from the time the damage was incurred, years before judicial demand.

Primarily because of *Alexander,* we conclude that prejudgment interest is not prohibited by the Louisiana decisions. With tens of millions of dollars of interest at stake, however, we do discuss several other cases that are cited by the parties or that cite *Alexander.*

Drs. Brown, Carter & Sauls v. Sauls, 418 So.2d 706 (La.App. 3 Cir.1982), *cert. denied* 422 So.2d 425 (La.1982), also cited by United, reasoned that interest did not run until 15 days after finality of judgment on an obligation to pay for stock, when the stock was to be delivered and paid for 15 days after finality of judgment. This reasoning is consistent with the basic rule that interest runs from the due date of the principal obligation, but does not otherwise affect the present case.

City Stores Co. v. Gervais F. Favrot Co., Inc., 359 So.2d 1031, 1035 (La.App. 4 Cir. 1978), affirmed interest from judgment on an award to a cost-plus contractor, noting many complicating factors and observing that it was only after having "considered these matters and rendered an award that a sum certain could be reached." Although the court did not use the word, it seems fair to characterize the court's reasoning as denying earlier interest on the ground that the amount due was not earlier ascertainable.

Land and Offshore Co. v. Martin, 469 So.2d 1177, 1186 (La.App. 3 Cir.1985), was a suit for damages for breach of contract. The court of appeal ruled, citing *Alexander,* that "the [trial] court should not have limited the interest to post-judgment interest. All sums due on a contract bear interest at least from the time of judicial demand." The damages were more easily ascertainable than those of LP & L and NOPSI, but they were nevertheless damages that had to be ascertained, and not mere return of purchase price or similar fixed dollar amount.

Magnolia Construction Co., Inc. v. Causey, 421 So.2d 990, 994 (La.App. 3 Cir. 1982), *cert. denied* 426 So.2d 177 (La. 1983), awarded interest from judicial demand on a judgment for damages (loss of profit) from a contractor's breach of a building subcontract by hiring another subcontractor. The court reasoned:

> "Counsel for the [subcontractor] cites *Alexander* . . . and urges that interest on the judgment should run

from the date of active breach of the contract. *Alexander* is a redhibition case. Although Justice Dixon cites Louisiana Civil Code Article 1932, which provides that damages are due from the moment of active violation, he also states that the Supreme Court has consistently said that all sums due on contracts bear interest from time of judicial demand. [Citing cases cited by *Alexander*.] Interest therefore should run from the date of judicial demand."

White v. Rimmer & Garrett, 360 So.2d 914, 919 (La.App. 3 Cir. 1978), also involved damages for breach of a building subcontract. This case differed from *Quinn* (cited by United) in that firing of the subcontractor was held improper and the subcontractor recovered the profits he would have made from full performance. But the court of appeal reversed the trial court's award of interest from judicial demand, observing:

> "In the recent case of *Alexander* . . . , the court, although concluding that in matters of contract . . . interest . . . on a damage award is due from the moment of an active violation of a contract or from the time the debtor has been put in default when the breach is passive, determined that interest in such cases is awardable only from the date the amount of the award is ascertainable."

We note at this point that the third circuit in *White* in 1978 and the fourth circuit in *Quinn* in 1968 both refused prejudgment interest on the ground that the damages were not ascertainable. Yet the third circuit in 1982 awarded prejudgment interest on comparable subcontract breach damages, in *Magnolia Construction, supra.*

Messina v. Koch Industries, Inc., 267 So.2d 221 (La.App. 4 Cir.1972), *aff'd* 283 So.2d 204 (La.1973), decided before *Alexander*, was a suit for money due on a contract to supply labor, equipment, and material for a specified por-

tion of a building contract, with material and labor to be charged at cost plus 10%. The trial court awarded interest from the last date that plaintiff performed under the contract, and defendant contended that interest should be allowed only from judicial demand. Rejecting that argument, the court of appeal reasoned:

> "Interest is an item of damages due for delay in the performance of an obligation to pay money. C.C. art. 1935. Debts bear interest from the time that the obligation to pay money arises. C.C. art. 1938. . . . [P]ayment . . . became due when the obligation to pay arose, not when judicial demand for payment was made."

National Roofing & Siding Co. v. Gros, 433 So.2d 403 (La.App. 4 Cir.1983), citing *Calhoun, supra,* allowed interest from the time of completion, rather than only from judicial demand (as the trial court had awarded), on an award to a building contractor for contract price less cost of completion.

Lone Star Industries v. American Chemical, 461 So.2d 1063, 1069 (La.App. 4 Cir.1984) *cert. denied* 465 So.2d 738 (La. 1985), a suit for the price of oil in which both the price per barrel and the number of barrels were disputed, reasoned: "Interest on the disputed, or unliquidated, portion of the contract price is due from the time the amount became ascertainable, that is from the date of the judgment."

See also *Louisiana Power & Light v. United Gas Pipe Line,* 642 F.Supp. 781, 810 (E.D.La.1986), which awarded pre-judgment interest on LP & L's damages from breach of contract (overcharging) by United on deliveries from the mid-1970s under the 1968 Sterlington contract.

In reviewing these several decisions on prejudgment interest, we echo the supreme court's observation in *Alexander* that such decisions "are naturally myriad and

because of their great number, if for no other reason, inconsistent. There is, however, a thread of consistency among the cases." 359 So.2d at 613.

Alexander itself confirms ascertainability as that thread, as the test to determine whether a debt bears interest only from judgment or, instead, from its due date (at least from judicial demand, a "putting in default," which renders due the damages from a passive breach of contract, C.C. 1933). The fundamental rule is that of C.C. 1938. Every (contractual) debt bears legal interest from its due date unless otherwise stipulated by the parties. A debt may be due before its amount is ascertained. Interest runs from the due date only if the amount is ascertainable. Interest may not run, not even from judicial demand, on a debt whose amount is not ascertainable except by a court's award (such as for reasonable attorney's fees as in *Alexander,* or for damages for breaching a contract for "intellectual enjoyment . . . or other legal gratification," C.C. 1934(3) (1870)).

One may well disagree with the individual result in some of the cases discussed above, without disagreeing with their basic reasoning. Their basic reasoning is that of *Alexander:* an amount that is not ascertainable bears interest from judgment, and an amount that is ascertainable bears interest from due date, which ordinarily is at least from judicial demand. The degree of difficulty of ascertaining ascertainable damages is not an obstacle to interest's running from their due date.

"Damages are due 'from the moment' of an active violation of a contract (C.C.1932) and from 'the time that the debtor has been put in default' when the breach has been passive. C.C.1933." *Alexander,* 359 So.2d at 613. Thus the obligation to pay the monetary damages for breach of the nonmonetary obligation to deliver gas arose, as to prelawsuit breaches, at the time that judicial demand put United in default, at the latest.

(2) and (3) Some Damages Not Ascertainable or Not Suffered as of Judicial Demand

Damages for alternate fuel costs already expended were both ascertainable and had already been suffered when suit was filed. United's monetary obligation to pay those damages was thus due, at the latest, upon judicial demand.

On the other hand, some damages, as for costs of alternate fuel that was yet to be required, were not ascertainable when suit was filed. No new requirements contract with another supplier fixed the alternate fuel costs over the life of the breached contract. United's obligation to pay the excess alternate fuel cost months or years later would depend, for ascertainment of its amount, on factors such as future market prices. We therefore agree that those costs were not ascertainable on the day of judicial demand, and that LP & L and NOPSI are therefore not entitled to interest on those costs from original judicial demand (even if otherwise due from that time).

That LP & L and NOPSI had not yet paid for the alternate fuel for later months and years also affects the date from which interest runs. If future costs were ascertainable (as if, e.g., a new requirements contract would supply all fuel), the excess cost could be discounted to value at judicial demand and judgment awarded for that value plus interest from demand. In this case, however, future costs were not ascertainable on the day of judicial demand nor until they were in fact incurred. Interest cannot fairly be allowed on the undiscounted value of those future costs for months or years before the damages they represent were actually sustained.

We conclude that the fair computation of interest requires that the damages for the excess alternate fuel costs (i.e., their excess over the contract prices for power-equivalent quantities) be deemed to become due only at the time that those costs were incurred. The parties agree that a basic measure of this element of damages is rea-

sonably approximated by LP & L's and NOPSI's own monthly fuel adjustment charges to their customers (although certain reductions from those charges are hereafter discussed in treating LP & L's appeal). That measure provides a means of approximating monthly excess alternate fuel costs and interest will run on all of them from the end of the month in which incurred. Interest will similarly run on other elements of damage from the time those damages were sustained and their cost ascertainable.

(4) Rate of Prejudgment Interest

The Louisiana Civil Code contained (until its partial revision by La.Acts 1984 No. 331) specification of the legal interest rate in both arts. 1938 and 2924.

Art. 1938 (1870) provided simply, "All debts shall bear interest at the rate of five per centum per annum from the time they become due, unless otherwise stipulated."

Art. 2924 (as amended, Acts 1908 No. 68) provided:

> "Interest is either legal or conventional. Legal interest is fixed at the following rates, to wit:
>
> "At five per cent on all sums which are the object of a judicial demand. Whence this is called judicial interest;
>
> "And on sums discounted at banks at the rate established by their charters."

Over the course of this litigation the rate of legal interest was increased in three steps to 12% per annum. United argues that the rate of 5%, as provided by C.C. 1938 at the time of the contracts in question, continued to apply because of C.C. 1940:

> "In cases where no conventional interest is stipulated, the legal interest, at the time the contract was made, shall be recovered, although the rate may have been subsequently changed by law."

The trial judge (in a proceeding testing the sufficiency of United's suspensive appeal bond) held that the rate increased as the law was changed, as now provided by C.C. 2924 though not by art. 1938.

The interest rates in both Arts. 1938 and 2924 were raised to 7% by La.Acts 1970 No. 315, to 10% by Acts 1980 No. 402, and to 12% by Acts 1981 No. 574. Art. 1938 was not otherwise changed. Art. 2924 was additionally changed, however, in the 1980 and later amendments, by the insertion of clauses making the new rates applicable to pending lawsuits from the effective dates of the amendments. As amended by Acts 1984 No. 458, Art. 2924 reads:

> "A. Interest is either legal or conventional.
>
> "B. (1) Legal interest is fixed at the following rates, to wit:
>
> > "(a) At twelve percent per annum on all sums which are the object of a judicial demand, whence this is called judicial interest; and
>
> "(b) On sums discounted at banks at the rate established by their charters.
>
> "(2) The rate of judicial interest resulting from a lawsuit pending or filed during the indicated periods shall be as follows:
>
> > "(a) Prior to September 12, 1980, the rate shall be seven percent per annum.
> >
> > "(b) On and after September 12, 1980, until September 11, 1981, the rate shall be ten percent per annum.
> >
> > "(c) On and after September 11, 1981, the rate shall be twelve percent per annum."

United contends that art. 2924 applies to noncontractual cases, and that this contract case is governed by arts. 1938 and 1940.

Appellees cite art. 1936's declaration that "the rate of both [legal and conventional interest] is fixed by law in the chapter on loans on interest," which is art. 2924's chapter.

The parties cite several cases, but none addresses United's argument. *Dyna International Corp. v. Mashburn*, 397 So.2d 1080 (La.App. 4 Cir.1981), awarded interest under art. 2924's schedule on the price of merchandise. *LeJeune v. J.W. Cappel Trust*, 405 So.2d 647 (La.App. 3 Cir.1981), and *Todd Shipyards Corporation v. Turbine Service, Inc.*, 574 F.Supp. 53 (E.D.La. 1983), both awarded interest under art. 2924's schedule on damages for breach of contract. But those cases do not discuss art. 1940.

We conclude, from the Code's several provisions cited, that art. 1938 applies to all obligations to pay money (save as delictual damages, governed by La.R.S. 13:4203), making interest payable from their due date (and providing legal interest unless a contract stipulates otherwise); art. 1936 places the fixing of rates in art. 2924; art. 2924 fixes legal interest rates for all debts that become "the object of a judicial demand," including "pending" lawsuits; art. 1940 may provide, for contractual debts that have not become the object of a judicial demand, that they shall bear interest at the rate at the time of contracting. We conclude that, in view of the explicit language of art. 2924 after its amendment effective September 12, 1980, art. 1940 cannot continue to apply to a debt for damages for breach of contract after that debt has been made the object of a judicial demand. Art. 1940 may still have application to a contractual obligation up until the time suit is brought upon the obligation. Until the 1980 amendment of art. 2924 to make the changing rates applicable to pending lawsuits, however, the earlier change in the rate of legal interest from 5% to 7% did not apply to these pending lawsuits, because the amending Act did not so provide. *Succession of Drake*, 359 So.2d 249 (La.App. 2 Cir.1978). On the other hand, it cannot fairly be contended that

damages that had not yet been sustained, at the time of the increase to 7%, remained governed by the 5% rate; by the same reasoning that refuses "pre-damage" interest, we hold that the legal interest rate at the time that *post-demand* damages were sustained applies to those post-demand damages. The result is that interest is payable, as to all damages sustained before original judicial demand, at 5% until September 12, 1980, and thereafter at 10% and 12% in accord with art. 2924's schedule; and, as to all damages sustained after judicial demand (which occurred after the 1970 amendment of art. 2924), at 7% until September 12, 1980, and thereafter at 10% and 12% in accord with art. 2924's schedule.

LP & L'S APPEAL

LP & L's appeal argues that (I) its delictual claim against United and Pennzoil should not have been dismissed; (II) the damages awarded for breach of contract were inadequate; and (III) the trial judge's order to deposit LP & L's damages with the court for its further orders is unauthorized by law.

I. LP & L'S DELICTUAL CLAIMS

LP & L claims, against United and United's onetime sole or controlling shareholder Pennzoil, that their acts damaged LP & L and that they are therefore liable for that damage under the delict (tort) rule of La. C.C. 2315:

> "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

LP & L also relies on C.C. 2324 (1870):

> "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with that person, for the damage caused by such act."

The record demonstrates that United's acts, abetted if not controlled by Pennzoil, damaged LP & L. LP & L cites (among other cases) *Borden, Inc. v. Howard Trucking Co., Inc.*, 454 So.2d 1081, 1096 (La.1983), for the rule that "a party can incur liability in tort, notwithstanding a contractual relationship . . . where the act causing the damage constitutes both a breach and legal fault." *Howard Trucking* awarded over $60,000, against a trucker and its tort liability insurer, for loss of methanol production during repair time attributable to the trucker's negligent damaging of a compressor it had contracted to transport for plaintiff. If scholars may dispute whether that kind of consequential damages should be allowed in any case (as *Howard Trucking's* four-three decision demonstrates), the rule seems quite beyond dispute that the existence of a contract does not confer tort immunity.

As to United, however, the legal cause of LP & L's damages was not some act that "constitute[d] both a breach [of contract] and legal fault," both a breach of the contract's "effect of laws" between the parties and also a breach of duty under general law. The cause of LP & L's damages was, simply, that United failed to perform its contractual obligations toward LP & L. United did not breach some general-law duty such as to drive safely, or to safely locate or pressurize or otherwise maintain its gas lines so as to avoid injury to third persons. If LP & L had had no contract with United, United would have had no obligation under general law (other than safety rules) towards LP & L to so deal with United's gas and pipelines as not to injure LP & L. LP & L's damage was the result not of any breach by United of a general legal duty, but of the breach of duties arising exclusively from contracts. United's conduct was not a delict, and United is not liable in tort to LP & L.

LP & L argues that Pennzoil is liable in tort for inducing United to breach its contract with LP & L (or for tortious

interference with that contract), although Pennzoil itself had no contractual obligation towards LP & L.

The Louisiana supreme court has held that an action cannot be maintained for inducing a third person to break his or her contract. *Kline v. Eubanks,* 109 La. 241, 33 So. 211, 213 (1902); *B.J. Wolf & Sons v. New Orleans Tailor-Made Pants Co.,* 113 La. 388, 37 So. 2 (1904). It has repeated that rule in *Moulin v. Monteleone,* 165 La. 169, 115 So. 447, 448 (1927); *Cust v. Item Co.,* 200 La. 515, 8 So.2d 361, 363 (1942). See also *Forcum-James v. Duke Transportation,* 231 La. 953, 93 So. 2d 228 (1957); and *PPG Industries, Inc. v. Bean Dredging,* 447 So.2d 1058 (La.1984). There have been indications that the court might reconsider that rule. *Sanborn v. Oceanic Contractors,* 448 So.2d 91, 95, n. 5 (La.1984). Those indications do not put it within the authority of a court of appeal, however, to refuse to follow a supreme court decision. Whatever the theoretical merit of Restatement 2d Torts §766, we are obliged to follow *Kline v. Eubanks* and its progeny. We therefore affirm the rejection of LP & L's claim against Pennzoil.

II. AMOUNTS AND ITEMS OF DAMAGE

LP & L argues that the trial judge erred in the amount of his award for excess fuel costs; in his denial of damages for the cost of conversion of generators from gas-burning to oil-burning; and in the amounts of his awards for increased maintenance and operation costs caused by oil-burning.

II(a). ALTERNATE FUEL COSTS

In evaluating damages for the excess cost of alternate fuel, an essential premise is that the breached contracts are requirements contracts. United was obliged to furnish LP & L with whatever gas LP & L required at Sterlington and one third of whatever gas LP & L required at Ninemile (within specified daily maximums and, for Ninemile,

an hourly maximum of one 20th of the daily maximum). This essential premise seems at times unacknowledged in the trial judge's calculation of the award for excess cost of alternate fuel, apparently because obscured by the use of an indirect measurement based on the fuel adjustment clause charges made by LP & L to its area customers. As hereafter explained, the parties attempted to approximate damages for the excess cost of fuel by use of LP & L's fuel adjustment charges to its area customers—an amount at least sometimes wrongly calculated by LP & L vis-á-vis its area customers, though not necessarily wrongly calculated vis-á-vis United, as the excess amount LP & L itself expended for alternate fuels.

A precise measurement of the amount of gas that would have constituted LP & L's requirements (within contract maximums), if United had not breached, and thus a precise measure of LP & L's excess cost of replacement fuel, is impossible. The principal contributor to this impossibility is LP & L's operation of its power plants in harmony with the power plants of LP & L's corporate siblings (including NOPSI, plaintiff in the consolidated case) in the integrated Middle South Utilities Company system, in a plan called economic dispatch. By economic dispatch, Middle South coordinates electricity production by its subordinate corporate electricity producers, so as to meet their combined demand at the lowest possible cost. Middle South does so by continually analyzing the costs of production and, through a central system operator at Pine Bluff, Arkansas, drawing each hour more electricity from the cheaper producers and less from the more expensive. On the basis of hourly calculations, each producer's cheapest electricity is by an accounting allocated to that producer for its own area customers; any producer's surplus of cheaper electricity is "sold" (for fuel cost alone) to sibling producers and any deficiency is made up by cheaper electricity from sibling producers. (Middle South also sells electricity to unrelated utilities, allocating the highest-cost electricity to

these "off-system" sales.) Presumably, had United continued to supply LP & L with gas that would produce electricity cheaper than that of LP & L's sibling producers, LP & L would have produced more electricity with United's relatively cheap gas (within the maximums of the requirements contracts with United) than it did with the more expensive alternate fuels. There are other factors, such as the relative heat equivalencies of and the efficiencies in burning gas and oil, that are measureable. But, to repeat, there is no way to measure precisely (1) the fuel cost of the amount of electricity that would have been produced by burning United's gas had United not breached, versus (2) the fuel cost of that same amount of electricity produced by burning alternate fuels or by buying electricity from corporate siblings (also, LP & L emphasizes, at the under-true-cost price of fuel cost alone).

LP & L therefore asked the trial court to make an award, as the best available basic approximation of LP & L's damages from the excess cost of alternate fuel owing to United's failure to deliver gas in accordance with its contracts, on the basis of the increases in LP & L's area customers' billings under the "fuel adjustment clause" authorized by governmental rate-controllers. United agrees, in its reply brief, that from April 1975 through December 1981 this "was a reasonably accurate reflection of increases experienced by LP & L in the cost of fuel used to generate electric energy for LP & L's area customers." United argued, however, that LP & L's calculation of that basic approximation at $78,523,963 required adjustments, some of which the trial judge made (including those for mathematical errors) while accepting the basic approximation, thereby reducing the award to $39,810,934. LP & L complains that six of those adjustments were erroneous.

Adjustment 1: Sales to Other Utilities

In respect to the period before April 1975, the trial judge eliminated $5,129,369 excess fuel costs "incurred by

LP & L in generating energy for sale to other utilities," concluding that "some of these costs would have been incurred even if United had not curtailed and are therefore not a result of United's breach of contract. LP & L has recovered [these costs] from other utilities. . . ."

LP & L argues that United has had the benefit of under-cost replacement electricity from Middle South's economic dispatch system when LP & L's siblings produced electricity more cheaply than LP & L could (especially after April 1975), and ought not be heard to complain of the burden of that system from the occasions when LP & L sold to its siblings (and others) before April 1975. We agree. We assert at the outset, as fundamental to this discussion, that LP & L's "requirements" under its contracts with United included all its needs for producing electricity, irrespective of whether sold to other utilities or to its Louisiana "area customers."

United's basic argument on this point is simply that LP & L has collected these excess fuel costs for sales to other utilities twice—once by its fuel adjustment charges to its area customers and once by its charges to the other utilities. That is indeed the case, until April 1975. After April 1975, the Louisiana Public Service Commission no longer allowed the excess cost attributable to electricity sold to other utilities to be openly included in the fuel adjustment charges to LP & L's area customers.

That LP & L's area customers should not be charged for increased costs of fuel for LP & L's sales to other utilities (whether or not also paid by the other utilities) seems indisputable. It does not follow, however, that United's breach of LP & L's requirement contracts did not oblige United to pay for those increased costs of fuel.

The trial judge erred in, in effect, so holding. As between United and LP & L, United was obliged to supply LP & L's requirements up to contractually-specified maximums, and failed to do so. The requirements contracts

did not deny LP & L the right to burn gas to produce electricity for sales to other utilities; and the charged-for replacement fuel for that purpose is not shown by United to have exceeded (equivalently) the contractual maximums, nor to have constituted by its quantity an abuse of the right to demand requirements within the contractual maximums.

We conclude that LP & L was entitled to recover as damages from United the excess costs attributable to sales to other utilities. LP & L's having charged its customers twice does not prevent it from recovering from United once.

The trial judge's finding that some of the costs before April 1975 "would have been incurred even if United had not curtailed" appears to relate to testimony of a United expert concerning electricity produced by oil-burning at Sterlington. In March 1975, of LP & L's total of 1,245,788 megawatt hours, LP & L's highest megawatt-hour cost was that for the generation by oil-burning at Sterlington. Oil-burning generated 3,668 megawatt hours that month, none of which was allocated to LP & L's area customers (who, to repeat, were allocated the cheapest electricity produced by LP & L), but all of which was included in calculating the area customers' fuel adjustment charges (as noted above). United's expert roundly reprehended LP & L (and the Louisiana Public Service Commission) for including the fuel-cost increases for sales to other utilities in its fuel adjustment charges to LP & L's area customers. One of that expert's declarations may have been the source of the trial judge's view that some costs would have been incurred even with no curtailment by United. That expert declared that LP & L's expert

> "doesn't know and I don't know . . . , even using his methodology, if United had delivered . . . enough gas to generate another 100,000 megawatt hours, I don't know that that 3,368 megawatt hours that was gen-

erated on oil at Sterlington wouldn't have been generated. I don't know that and he doesn't know that. But he still, you know, is suing United for it."

The expert's position, related to the fact that LP & L sometimes sold large amounts to sibling utilities and off the Middle South system, was that even a surfeit of gas would not assure one-for-one replacement of megawatts generated by oil-burning (and therefore lack of gas did not cause oil-burning). The expert argued that LP & L's government-authorized fuel adjustment charge against its area customers rewarded LP & L for generating higher-cost electricity, and the higher the cost the higher the reward: before April 1975, LP & L recovered, overtly and with PSC approval, twice the excess fuel cost of electricity sold to other utilities by charging both the utility and LP & L's area customers for that cost.

The material thrust of this argument by United, in the context of this action for damages for breach of contract, is that LP & L did not mitigate its damages. (That it was more profitable for LP & L not to do so is not material.) A failure to mitigate is not proven, however, by an expert's testifying "I don't know." The expert established the possibility of a profit motive for burning higher-priced oil even if a cheaper fuel were available: but United did not prove that a cheaper fuel was available. Certainly United, by its own breach, did not make a cheaper fuel available. United simply did not prove that LP & L did not mitigate its damages in this respect.

We therefore increase the award to LP & L by the $5,129,369 increased alternate fuel costs attributed to sales to other utilities.

Adjustment 2. Hourly Calculation of Damages

As noted above, LP & L submitted that its area customers' fuel adjustment clause charges were the best approximation it could make of its damages from the

increased cost of alternate fuel. LP & L had originally calculated those charges each month for the purpose of adding its added costs of fuel to its customers' base-rate monthly bills.

United attacks LP & L's calculations on the basis that they are defective as a calculation of the excess alternate fuel costs for electricity for LP & L's area customers (just as United argued as to Adjustment 1, above). United asserts that its own calculations of actual excess costs chargeable to LP & L's area customers, purportedly based on Middle South's hourly economic dispatch allocations and charges, show that LP & L's monthly calculations overcharged area customers by $14,874,170 between March 1976 and February 1980. The fundamental error of United's attack is that the question is not whether LP & L overcharged its customers, and how much, by its fuel adjustment calculations, but whether LP & L was damaged, and how much, by United's admitted failure to deliver United's requirements (or part requirements) of gas as it had firmly contracted to do.

In fixing the award to LP & L for its damages, nevertheless, the trial judge accepted United's arguments concerning the inappropriateness of the fuel adjustment charges passed on by LP & L to its area customers. He therefore reduced LP & L's calculation from the amount of its fuel adjustment charges by another $14,874,170, as United requested. He agreed with United that LP & L's excess alternate fuel costs from United's breach of its obligation to supply LP & L's requirements were more accurately calculable hourly rather than monthly and that LP & L's calculation on a monthly basis failed to distinguish between fuel LP & L would have burned regardless of curtailment and fuel burned as a result of curtailment. He concluded, using United's hourly calculations, that LP & L would have incurred $14,874,170 of these costs even if United had not curtailed.

We can agree that monthly calculations are not ideal, if only because the contracts set a daily maximum delivery obligation (and, at Ninemile, an hourly maximum of a 20th of the daily maximum). LP & L was certainly not entitled to overdraw the daily maximum on peak days because it had underdrawn it on other days of a month. But we cannot agree with the trial judge's first conclusion, namely that, because economic dispatch made hourly calculations, United's hourly calculations were more accurate than LP & L's monthly ones. (We note that, as United's expert testified, hourly variations from a 24th of the contract day's electricity usage are certain to occur, between still midnight and busy midday, perhaps somewhat moderated in winter but aggravated in summer by heating and cooling usage. Daily variations from a 30th of a month's usage would appear less drastic save on weekends and days of unseasonal climate. The error of monthly calculations would appear to be less than the error of hourly calculations for this reason.) Calculating hourly rather than monthly does not, in any case, explain the greater part of United's $14 million calculation.

There are three premises to United's hourly calculations that produce the difference in result from LP & L's monthly calculations and thereby the adjustment under discussion:

(1) the elimination of increased costs of electricity not allocated by Middle South's economic dispatch system to LP & L's area customers (notwithstanding that the requirements contracts included whatever gas LP & L needed for electricity);

(2) the treatment of United's contractual obligation to deliver at Ninemile "33-1/3% of the fuel requirements" as if it read "one half of the actual deliveries by Texaco" (which was bound by contract to supply the other two thirds of requirements, but after early 1979 did not); and

(3) the changing of a daily maximum delivery obligation (with an hourly maximum at Ninemile of one 20th thereof) into 24 hourly ones of one 24th thereof.

United's expert exemplified his calculation in the following testimony (with italicizing by this court of his premises that we deem mistaken):

"This . . . illustrates the way in which you would calculate the fuel replacement costs in the event of a United curtailment when you analyze those replacement costs for each hour just as the [Middle South] system operator makes these allocations each hour, and I would like to start with . . . an hour in which the calculation shows the complete replacement of the entire United curtailment. In hour 16, 4 p.m., the total load of the LP & L system, the *area load* [for "area customers"] of LP & L is 2,920 megawatt hours. That is equivalent to the 3,000 mwh . . . that goes to *Louisiana area load.* When we started off at the cheapest sources—remember the cheapest sources available to LP & L go first to serve LP & L [area customer] load--there are 1700 mwh that are available from other gas sources. Texaco gas at Little Gypsy, Texaco gas at Ninemile 5, could be sometime LGP [Louisiana Gas Purchasing, discussed hereafter] gas is cheaper. In any event, there are 1700 mwh served by the cheaper gas. . . . This [number] is for purposes of illustration, although it is based on a typical hour. Now, Texaco delivers in this hour to Ninemile units 1 through 4 . . . enough gas to generate 580 mwh and United delivers 70 mwh. Now, if you add that up [1700 + 580 + 70], you will see that you have got a total of 2350 mwh. You are obviously short of serving the *Louisiana area load.* In order to serve *that load,* you had to burn . . . the oil equivalent to 570 mwh . . . [to] come up with the total [*LP & L's area customers*] load of 2,920 mwh.

"We now have to determine what the alternate fuel costs were to replace the United curtailment and we do this in the same way that [LP & L's expert] did it for LP & L.

"*The United obligation is one-half the delivery to Ninemile units 1 through 4 by Texaco,* and obviously one-half of 580 is 290 mwh, but United, as we saw, delivered only 70 mwh of equivalent fuel. If we subtract the 70 from 290, clearly we have the need to replace 220 mwh that United was obligated to deliver. So the replaced curtailment with alternate fuels is 220 hours . . . that had to be replaced by LP & L with higher cost . . . fuel. . . .

"Now, if I can direct your attention to . . . hour 8[,] . . . an hour in which there was a United curtailment but no responsibility for alternative fuel costs. . . . The load in hour eight, that is 8 a.m., . . . is only 1,980 mwh. . . . These fluctuations in hourly load are typical of the daily fluctuation in load experienced by any utility. Now, again, we find that . . . there is low-cost gas available sufficient to generate 1,480 mwh to serve *the Louisiana area load.* Also, Texaco is delivering to Ninemile 1 through 4 the equivalent of 540 mwh. We can see that we have already exceeded *the Louisiana area load. 1480 plus 540 is 2,020 mwh, but the Louisiana area load is only 1,980 mwh, so that we already see that in this hour, 40 mwh generated by Texaco, the low-cost Texaco gas*[,] *is going off the LP & L system.* It is equivalent, it is part of this 1,000 mwh . . . going to the [Middle South] exchange.

"Clearly, given the fact that the way the energy is allocated with the cheapest energy going to the area load and the next cheapest or the next more expensive going off system, clearly *if this generation by Texaco gas* at $3 a mwh *already is in excess of*

the Louisiana power area load by 40 mwh, *this additional 70* [mwh from United gas] *at the more expensive $7.50 is also going to serve customers outside the Louisiana area load. If United had delivered every cubic foot of gas that it was obligated to deliver in that hour, that gas would not have gone to the Louisiana load. . . . Every additional cubic foot that United could have delivered would have gone to serve non-Louisiana* [i.e., non-LP & L area] *customers.*

And we can see that *the United obligation is one-half of Texaco's deliveries,* that is 270 mwh. [United] actually delivered 70, so if we are simply looking at curtailment, their curtailment was the equivalent of 200 mwh, *but the amount of that curtailment that was replaced was actually zero because no kwh generated with United gas could have possibly gone to the Louisiana area load.* Therefore, the cost of replacement is zero. . . .

"[In] hour 11, 11 a.m., the load is . . . 2,420 mwh. Of this total, 1,690 mwh of cheap gas . . . is provided. Texaco delivers 580 mwh and United once again . . . delivers 70 mwh, but this is still short of the *Louisiana area load* by 80 mwh and it is necessary for LP & L to burn oil equivalent to generation of 80 mwh in order to satisfy its *area load.* So, how do we calculate the cost of that curtailment.

"*The United obligation once again is one half of the Texaco delivery,* again half of 480 is 290 mwh. The actual deliveries by United were only 70, so United's curtailment is equivalent to 220 mwh. *However, in this case, the first 80 mwh of that curtailment,* had it been delivered, *would have gone to serve the Louisiana area load and then . . . anything in excess of that 80 mwh,* that is, the additional 140 to make up the 220 curtailment, *would have gone off system. . . . So it is only the 80 mwh that would actually have had to have*

been replaced [to supply LP & L' area customers] *that should count as the curtailment for which there was an incurrence of alternative fuel costs passed through to Louisiana customers."*

Of the three previously noted premises of United's hourly calculations, as shown by that testimony, the first and most important is its exclusion of excess fuel costs allocated by Middle South's economic dispatch to other utilities. We repeat, again, that the requirements contracts between LP & L and United do not limit LP & L's use of gas to generation of electricity for its area customers. United's hourly calculation excludes from LP & L's damages any excess alternate fuel cost for electricity allocated to other utilities (always the highest excess alternate fuel cost, because of the Middle South economic dispatch). We have rejected this exclusion in Adjustment 1 and we reject it here as well. United was obliged by its contracts to supply whatever gas (within contract maximums) LP & L required for generating electricity, whether for its area customers or for other utilities.

The second premise of United's hourly calculation—that United's delivery obligation at Ninemile was half of Texaco's actual delivery—finds no support in the contract language. The language requires "33-1/3% of the fuel requirements" (not over 80,000 Mcf a day, nor over a 20th of that in any one hour). As long as Texaco was not itself curtailing deliveries of its very cheap gas (and the other third of requirements was met, including in part from United), United's contractual one-third of requirements would indeed approximate half of Texaco's actual delivery. But once Texaco itself began to curtail, that equivalency existed no longer. For example, in United's expert's "hour 8," *for the "Louisiana area load" alone,* Ninemile units 1 to 4 generated 1,980 mwh. The minimum "requirement," therefore, was fuel sufficient to generate 1,980 mwh. Texaco's 2/3 of that requirement would have been gas for

1,320 mwh (and United's 1/3 would have been gas for 660 mwh). Texaco was curtailing, however, and actually delivered gas for only 580 mwh instead of 1,320. United's "hourly calculation" calculates that United owed only half of the 580 mwh of fuel that Texaco delivered, rather than half of Texaco's contractual obligation of 2/3, which was 1,320 for the Louisiana area customers alone (ignoring other utilities, and ignoring that "requirements" might have been greater if Texaco gas could be burned instead of more expensive fuels). United's hourly calculation reduces United's clear contract obligation of (at least) 660 mwh of fuel to only 290 mwh of fuel. United's expert was clearly wrong in calculating damages on the basis that United owed no greater gas delivery at Ninemile than half of Texaco's actual delivery.

In respect to the third premise, we repeat that the contracts provided daily maximum delivery obligations (with the only hourly maximum being, at Ninemile, a 20th of a day's maximum). The significance of an hourly calculation itself, essentially, is that if in any hour LP & L's alternate fuel costs (including any cheaper-cost electricity produced by Middle South siblings) did not exceed what United's gas would have cost, not only is United's breach treated as causing LP & L no damage (as in the example's "hour 8") but, in addition, one 24th of United's delivery obligation for that day is treated as discharged. The latter treatment is unjustified under the terms of the contracts, which state daily maximum delivery obligations (or, at Ninemile, an hourly maximum of a 20th of a day's maximum), rather than an hourly maximum of a 24th of a day's maximum. The contracts did oblige LP & L to take gas "in equal daily and hourly quantities as nearly as operating conditions will permit," but that contract wording recognizes that demands for electricity do vary among the hours of a day (e.g., between a summer midnight, when sleeping homeowners and closed businesses use less airconditioning and other machinery, and a summer midafternoon, when

airconditioning demands the most electricity and other machinery is more likely to be in use). The contracts only obliged LP & L to take gas at a uniform rate as operating conditions would permit, and United's hourly calculation errs in dividing its daily delivery obligation into 24 uniform hourly delivery obligations.

We summarize our conclusions on the "hourly calculations" adjustment: LP & L's monthly fuel adjustment clause charges to its area customers are not ideally precise calculations of the excess fuel costs portion of LP & L's damages, because monthly calculations would not account for any fuel usage in excess of the contracts' daily maximums (much less usage in any one hour in excess of a 20th of the daily maximum). United's hourly calculations, on the other hand, are entirely unacceptable because they limit "requirements" to requirements for area customers, they limit United's Ninemile delivery obligation to half of actual deliveries by Texaco during Texaco's curtailment, and they change daily maximums into 24 hourly maximums of one 24th of the daily maximum.

Our final conclusion on this point is that United's hourly calculations must be rejected and LP & L's monthly calculations accepted. LP & L's calculations reasonably approximate LP & L's damages from excess costs of alternate fuel purchases. The errors LP & L's monthly calculations may contain as summarizing of total excess alternate fuel costs chargeable to its area customers are not errors in summarizing LP & L's damages from the costs it had to pay. The charges to LP & L's area customers did not, after April 1975, include all excess costs of alternate fuels for electricity sold to other utilities although United's requirements contracts obligation included gas for that electricity, and therefore LP & L's basic approximation itself understates, to that extent, its damages. All factors considered, we conclude that LP & L's basic approximation should not be reduced by United's hourly calculations. We therefore increase the award to LP & L by $14,874,170.

Adjustment 3. Ninemile "Requirements" After Texaco Curtailed

The trial judge rejected LP & L's claim, to the extent of $10,819,212, of alleged excess costs of alternate fuel (including electricity generated elsewhere) to replace gas that United was obliged to but did not deliver to Ninemile units 1 through 4 after Texaco began to curtail its Ninemile deliveries in early 1979. The trial judge accepted United's position that its third-of-requirements delivery obligation at Ninemile was only one third of the fuel actually used during the period when both United and Texaco (together obliged to supply all requirements of those Ninemile units) were curtailing their deliveries. The trial judge points out that LP & L's hypothetical requirements for 1979, 1980 and 1981 are substantially greater than actual usage in 1977 and 1978, when Texaco was not curtailing.

LP & L argues that actual use is not a measure of fuel "requirements" under the circumstances. Again, Middle South's economic dispatch system plays a role: to the extent that burning higher-priced alternate fuels available at Ninemile produced electricity at a higher cost than that of a sibling utility or even of another LP & L plant, the system operator would not draw electricity from Ninemile. LP & L argues that, if Texaco had continued to deliver its Ninemile obligation, the Middle South system operator would have drawn very much more electricity from Ninemile, causing Ninemile to take a large measure of the Texaco contract maximums, because Texaco gas generated electricity from two to several times cheaper than other electricity generated by LP & L and its Middle South siblings with other fuels. (See, e.g., United's hourly calculation example, with Texaco gas costing $3 per mwh produced, United gas $7.50 and oil, always very high priced, $16. In 1979 to 1981, oil increased to $23 to $41.) A United expert agreed that LP & L's calculations of the amounts Texaco would have been called on to deliver, notwithstanding less usage in 1977 and 1978, were "pretty

close to what the actuality might have been had they operated" (although that expert would have used hourly calculations, as earlier described, instead of LP & L's monthly ones).

LP & L's calculation of this part of its fuel damage claim takes into consideration one half of the Texaco contract maximum (rather than, simply, the United contract maximum) because the Texaco maximum was relatively smaller than the United maximum and in practical effect also limited the United maximum. United's third had a daily maximum of 80,000 Mcf; Texaco's two-thirds had a daily equivalent maximum of only 142,000 Mcf. If the much cheaper Texaco gas had been available and LP & L had taken the 142,000 Mcf maximum as Texaco's two thirds, it could only have demanded half of that, or 71,000 Mcf, as United's one third, of LP & L's requirements for Ninemile 1 through 4. LP & L would presumably not have been able to demand the other 9,000 Mcf of the United's 80,000 contract maximum (because United was only obliged to deliver a third of requirements) unless LP & L were able to acquire an additional 18,000 Mcf equivalent atop Texaco's fixed-price maximum of 142,000. Thus the relatively lower Texaco maximums constituted, in times of high fuel costs, a practical maximum on United's obligations as well.

The ultimate question on this point is whether requirements are measured by what LP & L would have used in the absence of United's and Texaco's breaches, or by what LP & L did use in the presence of those breaches. One United expert observed:

> "It seemed to me that the fuel adjustment clause as it was applied was inappropriate . . . that there were a number of questions still unresolved; for example, . . . the calculation for the period in which Texaco was in curtailment based on the fuel burn. Now we thought it was unfair to introduce this extraneous

> consideration. . . . But . . . that is a legal issue to be resolved and if you resolve the issue one way, you get one kind of calculation. If you resolve it another way, you get another kind of result."

It was the trial judge's function to resolve that legal issue, of whether LP & L's damages are limited to excess costs of replacement fuel actually burned at the Ninemile units, or whether, to the contrary, damages may be recovered for the excess cost to replace fuel that LP & L shows, more probably than not, it would have required were there no breach.

We conclude that the proof does establish, as more probable than not, that if Texaco had not curtailed, Ninemile would have burned (and therefore required) a very large part of the Texaco maximums, as LP & L reasonably calculated—because neither LP & L nor its siblings could generate all of the electricity they required by burning other available fuels as cheaply as by burning Texaco gas. LP & L would equally have required, therefore, half of that Texaco quantity from United as United's third of requirements (well within contract maximums), to produce the electricity that LP & L would have produced at Ninemile for its own area customers and for its siblings. We add that this is not a claim for hypothetical lost profits but for actual losses. The electricity that the missing Texaco and United gas would have generated was in fact generated. Alternate fuels to produce that electricity were in fact burned, although at other generating units because fuel costs there were cheaper than those of Ninemile (resulting in a mitigation of LP & L's damages). This excess fuel cost damage to LP & L was real.

We therefore add to LP & L's award this $10,819,212.

Adjustment 4. Test Energy at Waterford

LP & L argues that the trial judge erred in deducting, from LP & L's basic approximation of total excess alter-

nate fuel costs from United's breach, the excess alternate fuel cost of $1,522,137 for fuel burned at LP & L's plant at Waterford to test its new generators. This argument is related to a part of the argument on Adjustment 3, that electricity not produced at Ninemile because of United's and Texaco's breaches had to be produced elsewhere to fill Ninemile's "requirements." Throughout the several adjustments to its excess fuel cost calculations, LP & L consistently argues that it has done the best it could to approximate its increased fuel costs by totalling those passed on to its area customers; and that this best-available approximation—which does not include in full all excess costs of fuel for electricity sold to other utilities—is not subject to individual adjustments because it is only an approximation. We have agreed with this point of view as to some of the adjustments, but we are unable to do so as to this one.

With United in default, certainly Ninemile's or Sterlington's "requirements" could have been made up in part by purchasing electricity from Waterford (as from other generators), in which case LP & L would recover, in effect, the excess cost of Waterford fuel. The Waterford test electricity did indeed flow to LP & L's areas customers or other purchasers, and in that sense helped to meet what might otherwise have been requirements of Ninemile and Sterlington.

If United had not defaulted, however, Waterford testing would still have occurred, using fuel at then-market price. (The fuel would not have been United's low-priced gas, because the contracts for Sterlington and Ninemile requirements did not entitle LP & L to gas for use elsewhere.)

Accordingly, whether United had defaulted or not, Waterford would have had the same excess cost of test fuel, notwithstanding that Waterford test electricity flowed to LP & L's purchasers and therefore reduced LP & L's

other "requirements." It therefore cannot fairly be said that United's breach caused the excess cost of fuel for testing at Waterford. Nor is United unjustly enriched by escaping responsibility for that part of its requirements obligation, for United did not owe requirements for Waterford testing.

We affirm the trial judge's elimination of this $1,522,137 excess cost of fuel from LP & L's calculation and award.

Adjustment 5. Louisiana Gas Purchasing Corporation Gas

The trial judge reduced LP & L's award by $4,987,006 because of LP & L's contract with its sibling utilities regarding a gas supply for Sterlington that LP & L acquired in August 1971. LP & L at that time entered a 20-year, fixed-price contract with Louisiana Gas Purchasing Corporation (at about twice the cost of United's contract price—though still cheaper than much replacement fuel—and at the further cost of laying a pipeline and agreeing to "take-or-pay" provisions). LP & L contracted with its siblings that they would take both burden and benefit of 65% of the electricity to be generated by LP & L's burning this gas at Sterlington: LP & L agreed to "sell" (and they always to "buy") 65% of the electricity generated with this gas. This electricity might be cheaper or dearer, from time to time, than other Sterlington generation. It would, therefore, under ordinary economic dispatch practice, have been allocated to LP & L's area customers when cheaper but to the sibling utilities when dearer. The trial judge treated this action, in effect, as a failure to mitigate damages properly because, as it turned out, this gas was cheaper over the years than other available fuels.

In our view, the critical fact is that LP & L did not give up this gas, did not give up a substantial supply of a replacement fuel that was cheaper than most other replacement fuels. LP & L burned all of this gas, at Sterlington. It also burned other, more expensive alternate

fuels, to meet its requirements at Sterlington. Its fuel requirements, we repeat once again, were not limited to fuel to generate electricity for its own "area customers" but included fuel for whatever electricity it generated for whatever customers (subject to contract maximums). And, to the extent that its requirements might from time to time have exceeded contract maximums, United was not entitled to have the benefit of the cheapest fuel that LP & L used in any event.

We add that LP & L's obligation to mitigate damages did not oblige it to invest in the substantial cost of a pipeline to bring the LGPC gas to Sterlington, nor to take the risk that later market conditions would leave it with a 20-year supply of higher-priced gas that it was obliged to take or pay for in increasing quantities. See *Unverzagt v. Young Builders, Inc.*, 252 La. 1091, 215 So.2d 823 (1968).

We therefore increase the award to LP & L by this $4,987,006.

Adjustment 6. Sterlington Damages after 1974

LP & L argues that a $225,000 reduction made by the trial judge is a partial duplication of the "hourly calculation" adjustment. LP & L asks correction only if we do not reject the hourly calculation. Because we did reject that calculation, this argument becomes moot.

II(b). CONVERSION COSTS

There is an inconsistency in awarding as damages the excess cost of oil burned as replacement fuel, and the increased maintenance and operating costs from using oil, while denying any recovery whatsoever for the cost of equipment to burn the oil. The trial judge awarded no damages for the $17,757,645 that LP & L spent in converting some generators at Ninemile and Sterlington to burn oil. There are difficulties in fixing an award, but it indeed appears that United's breach caused at least part of these damages at both Sterlington and Ninemile.

Sterlington

The 1956 Sterlington contract obliged United to provide, from 1958 to 1978, LP & L requirements for unit 5 and the "proposed new Unit No. 6," up to 50,000 Mcf a day. A contract mechanism provided for increasing the daily maximum and it was increased, in 1966, to 55,000 Mcf, and a 1967 "standby" contract gave LP & L another firm 16,000 Mcf, for a total maximum of 71,000 Mcf. The maximum was then reduced, however, to 30,000 Mcf for 1970 and 25,000 thereafter, by agreements on both contracts in 1969, when LP & L believed it could get cheaper gas elsewhere. As it turned out, LP & L could not get the other gas. The consequence was that LP & L was entitled to only 25,000 Mcf after 1970 instead of the 71,000 it had had under contract since 1967.

That reduced maximum, even at the 1970 level of 30,000 Mcf, was inadequate for the generating capacity of Sterlington. Atop that inadequacy came notification from United of potential peakday shortages and other gas supply problems in the future.

The Sterlington boilers (unlike those of Ninemile) were not capable of burning oil even for a few days at a time. LP & L therefore decided, in Summer 1970 (before actual curtailment by United began in Fall 1970), to provide a part-time oil-burning capability. This "Phase I" conversion was completed in 1971 at a cost of $2,238,268.

The evidence supports the trial judge's inference that this Phase I conversion (notwithstanding incidental usage during United's curtailment) was required by LP & L's having only a 25,000 Mcf daily gas supply, rather than by the danger of curtailment of even that 25,000 Mcf. We cannot say that the trial judge was wrong in rejecting this item of LP & L's damage claim.

United began curtailing in late 1970. Sterlington 6 was thereafter converted to full-time oil-burning capability in

1974 to mid-1976, at a cost of $2,481,409. The trial judge reasoned:

> "Even if United had not been in curtailment, the maximum deliveries by United under the Sterlington contract plus that available from other suppliers would not have been adequate for the Sterlington station in the 1970's. The Phase II conversion would have been necessary in any event."

We agree that this conversion would have been necessary in any event, but it would not have been necessary until two years later. Even if we were to award to LP & L nothing but interest on the costs expended in 1974-1976 that could have been postponed until 1976-1978 (ignoring that some part of the useful life of the oil burners was expended), two years at 12% would amount to 24% of the total cost.

The trial judge's ruling, moreover, has the effect of giving United credit for LP & L's cheapest means of generating substitute heat. United was entitled to have LP & L mitigate its damages by burning other fuel, but not by counting as United's substitute any gas that LP & L was unable to acquire, nor even the oil that LP & L was able to use with unit 5's part-time oil-burning capacity (the cost of which, the trial judge held and we affirmed above, was LP & L's sole responsibility). The most expensive substitute heat, by a correct accounting, was that that came from the full-time oil-burning by unit 6, because the true full cost of that heat inescapably includes some cost of the burning device supplied by the Phase II conversion. United's breach was a cause of the Phase II conversion at Sterlington, and some part of the cost of that conversion is part of the damage from that breach.

To award to LP & L the full cost of a permanent conversion in 1974-1976, with a life expectancy of perhaps 25 years, would unjustly enrich LP & L, for United's breach only endured until the end of its contract in 1978. Indeed,

United's expert testified that it would have been unreasonable to expend the cost of conversion if oil were to be burned for only two years or so. Evidence that gas again became available and used as Sterlington's fuel in the 1980s supports LP & L's argument, however, that it has not had and will not have the benefit of the oil-burning capacity of unit 6 for its useful life, and therefore should not have to pay for the full post-contract part of that life. There is also merit in LP & L's argument that United's breach at least caused LP & L to expend the cost of conversion (to the extent needed because of contract expiration) before it would otherwise have had to do so.

Thus to award none of this cost would be error, yet to award all is equally sure to be wrong. We are left with the necessity to make an apportionment. We consider that, after the United contract expired in 1978, LP & L had need for oil-burning, and that LP & L's need after contract expiration endured for much over half of the total time that the conversion fulfilled such a need, that is, over half of the actually used life of the equipment. On the other hand, LP & L had to pay for that need at least two years early. We deem it a reasonable apportionment of this Phase II cost to charge a third to United and two thirds to LP & L. We therefore increase LP & L's award by a third of this $2,481,409, or $827,136.

Ninemile

The 1968 Ninemile contracts with United and Texaco promised a 25-year firm supply of gas requirements for units 1 through 4 (although prices were negotiable for the last five years). United curtailed its deliveries from late 1970. Texaco did not curtail until 1979. Ninemile units 1 through 3, previously capable of part-time oil burning (four to five days at a time), were converted to full-time oil-burning capability between 1973 and 1977.

The trial judge reasoned:

"As pointed out by the Court in its discussion of Phase I and Phase II conversion of Sterlington Unit 6, the conversion of Ninemile Units 1-3 would have been necessary in any event. Furthermore, the Court is of the opinion that this conversion process was not within the contemplation of the parties at the time of the confection of the contract, or considered as a possible element of damages even if the contract was breached."

The Sterlington reasoning is not applicable to Ninemile. Sterlington had very inadequate daily maximums of gas under contract (reduced to 25,000 Mcf from 71,000) when United curtailed, and the contract was to expire in less than eight years. Ninemile, on the other hand, had contracts for its full requirements (with unreduced delivery maximums), under contracts that provided fixable prices through 1987 and negotiable prices through 1992.

The trial judge's ruling that conversion of Ninemile "would have been necessary in any event" may refer to the fact that Texaco's 1979 breach would have required it, or may be an acceptance of United's argument that federal orders would have prevented United's fulfilling its contractual obligations. In either case, we disagree. Texaco's 1979 breach did not cause a 1974 conversion. And we have already noted, and agreed with, the trial judge's rejection of United's federal orders defense, and we again reject that defense as embodied in the argument that conversion of Ninemile would have been necessary even if United had not curtailed. The necessity of conversion of some part of Ninemile's plant resulted from United's overall breach, just as the federal orders did. The ruling that conversion would have been necessary if United had not breached is clearly wrong.

Also wrong is the ruling that conversion from gas to oil was unforeseeable as a consequence of nondelivery of gas by United. United well understood that its contract

was to supply fuel to provide heat for boilers to provide steam to drive generators. As a matter of law, United had to foresee that, if it breached, LP & L would have to burn fuel from other sources for that purpose. As pointed out in treating United's appeal's "other damages" argument, above, the traditional doctrine is that unforeseeability relates to the cause and not the cost of the damages. It was patently foreseeable that, to operate the Ninemile boilers, some equivalent quantity of fuel—gas, oil or coal—would have to be burned. Equally evident was that conversion would be necessary to burn oil or coal. United was entitled to have Ninemile produce the heat for its boilers by the cheapest means available, but United was not entitled to have Ninemile cease operations. Conversion of some Ninemile units to oil-burning capability was, it is not disputed, the cheapest means available.

United is obliged to pay for the conversion of Ninemile 1 through 3, for that conversion was made necessary by United's breach alone, years before Texaco breached. We therefore amend the award to LP & L to include the $13,037,968 cost of the Ninemile conversion.

II(c). INCREASED OPERATION AND MAINTENANCE COSTS

As we noted in treating United's appeal, a United expert conceded that operating and maintenance costs are higher for generators fueled by oil than for those fueled by gas. We earlier upheld the trial judge's conclusion that United was liable for the increased costs of maintenance and operation, at least in the amounts that United's proposed findings of fact had provided.

The evidence on both items consists of an LP & L expert's factual and expert testimony and calculations and the attack thereon by a United expert.

Operation

LP & L calculated its added costs of operation from the salaries that it paid to specified operators during the

breach, multiplied by 1.5 to include LP & L's overhead factor. That calculation produced the claim of $1,648,841.

United's expert expected such documentation as staffing plans and job descriptions to justify the need for the additional operators. He also contended that LP & L was, to some amount indeterminable without full documentation, claiming a partial double recovery on this item, because LP & L also indirectly charged, as a fuel cost, some of the salaries of these operators who worked on the adjacent fuel storage facility for a related corporation (System Fuels Incorporated) that sold oil to LP & L. His strongest attack pointed out that there were extended periods of months and, literally, years in which no oil was burned in each of Ninemile units 1 to 3 and Sterlington 6; and that, as LP & L's witness had testified, the additional operators worked in other areas of the plant when not occupied in oil handling or oil storage.

We cannot say that the trial judge erred in rejecting the $1,648,841 claimed by LP & L and in awarding, instead, the $289,676 proposed by United.

Maintenance

LP & L claims $5,005,800, but the trial judge awarded only $208,532, as additional maintenance costs resulting from the use of oil as a fuel.

The same expert whose testimony was accepted by the trial judge to reduce the operating expense claim gave similar testimony regarding the maintenance claim.

LP & L's witness prepared total actual maintenance costs and estimated what costs would have been if only gas had been burned. The difference between the two is the amount of LP & L's claim. LP & L did not keep records of individual generator unit maintenance costs. The actual costs were for all units at a plant, e.g., at Ninemile, for units 1 through 5, although only units 1 through 3 ever burned oil. United's expert again attacked both lack

of documentation and the calculation method of this claim. Specifically, he objected to estimating the gas-only cost on the basis of the average of 1971 through 1974, with no correction for inflation. He showed that correction for inflation would have sharply reduced the difference between the actual maintenance costs and the corrected estimated costs.

We are again unable to conclude that the trial judge erred in accepting United's expert's testimony and the damage amount of $208,532 as proposed by United rather than the $5,005,800 claimed by LP & L.

III. DEPOSITING AWARD WITH COURT

The Louisiana Public Service commission, before 1975, authorized LP & L to bill LP & L's area customers an additional charge named a fuel cost adjustment, for the excess costs of fuel that LP & L burned to generate electricity not only for its area customers but for other utilities as well. Perhaps the trial judge felt strongly that the area customers might suffer a comparable inequity in respect to LP & L's recovery of those charges to the area customers in this case, if that recovery were left to the PSC to allocate (although its membership has changed meanwhile and that method had been changed by it in 1975). Perhaps for that reason, although no party requested it, the trial judge ordered the award deposited with the court for further proceedings by LP & L and the commission.

We agree with LP & L and the commission that the disposition of the award is a matter for the commission to decide. La. Const. art. 4 § 21(B) places regulatory power over utilities in the commission. This power includes ratemaking. R.S. 45:1163. Ratemaking includes fixing refunds. *Louisiana Power & Light Co. v. Louisiana Public Service Com'n,* 377 So.2d 1023 (La. 1979). Because there is no action in this case by the class of LP & L ratepayers, it is not governed by *City of New Orleans v. United Gas Pipe Line Co.,* 438 So.2d 264 (La.App. 4 Cir.1983), *cert.*

denied 442 So.2d 463 (La.1983), suggesting that a class's recovery may be deposited into court and holding that a regulatory commission may not intervene in the class action.

NOPSI'S AND THE CLASS'S APPEAL

NOPSI and the class of its electric ratepayers seek, atop the trial court's award of $44,403,106, $8,031,276 costs of conversion of generators to oil-burning and $34,457,304 and $6,728,180 for lost profits on hypothesized sales to other utilities and to its area customers. The class's request for judgment in tort against United is rejected on the grounds LP & L's was.

I. CONVERSION COSTS

NOPSI's contract with United was scheduled to expire on June 1, 1975. The trial judge correctly ruled that NOPSI's management planned conversion of its generating units to oil-burning capability. NOPSI knew, from United's peak-day problems in the winter of 1969-1970 and other indications, that NOPSI might not be able to get gas and might have to burn oil after June 1, 1975. NOPSI had therefore begun preliminary planning and long-range budgeting for conversion to oil. United emphasizes that this occurred before United began curtailing.

As in the case of Sterlington's Phase II, however, the conversion had to be done earlier than otherwise necessary, because of United's breach. The conversion of Paterson station and Michoud unit 2 was completed in December 1972, that of Michoud 3 by March 1973, and that of Michoud 1 by April 1973. Thus, again, these conversions were completed over two years earlier than necessary for readiness for July 1975.

NOPSI ultimately converted seven gas units from part-time to full-time oil-burning capability. It did not finish

this conversion before its United contract expired, but part of the conversion that was completed was used (together with the pre-existing part-time oil capacity) to generate electricity that would otherwise have been generated by United's gas. NOPSI seeks all conversion costs that were expended up until the June 1, 1975 expiration of its United contract.

The ratepayers note that, of the power NOPSI generated from January 1973 through the May 1975 expiration of the contract, 35% was generated with oil. They argue that this generation, replacing generation that United gas should have fueled, would not have been possible had NOPSI not converted. This argument is not wholly persuasive, because NOPSI had part-time oil-burning capability prior to the conversion, and the noted 35% of power was not generated by burning oil exclusively in the new, full-time burners. The rate-payers also assert that, had United not curtailed, utility regulation principles would not have allowed NOPSI to include, as a "used and useful" capital investment for rate purposes, the $8 million spent before the United contract expired.

We conclude, as we did with LP & L's Sterlington Phase II conversion cost, that certainly it would be wrong to assign to United 100% of NOPSI's conversion cost but, equally certainly, it would also be wrong to assign to United 0% of that cost. The useful and necessary life of the NOPSI conversion falls far less within than without the life of the breached United contract. Moreover, the basic division of costs on the basis of the June 1, 1975 date of expenditure does not adequately identify the costs of the conversion whose earlier completion can be deemed caused by United's breach. We deem it reasonable and fair—certainly more correct than either 100% or 0%—to assign to United 25% of only those costs expended within the period of United's breach.

Of the total conversion costs of $14,481,168, those before the contract expired were $8,031,276. Of that amount we award NOPSI $2,007,819.

II. LOST PROFITS

On Sales to Off-System Utilities

NOPSI's claim for the loss of $34,457,304 profit that it would have made by selling cheap electricity to other utilities outside the Middle South system was rejected by the trial judge on the grounds that the economic dispatch practice would not have allowed it and that it was beyond the contemplation of the parties at the time of the contract. NOPSI argues persuasively that its applicable written contracts with Middle South did not prevent sales to off-system utilities. NOPSI also argues that its requirements contract with United contemplated whatever gas NOPSI required to generate electricity. We agree with the first argument but we must temper the second.

La.C.C. 1901's requirement that contracts be performed "with good faith" applies to both parties. NOPSI and LP & L condemned United for its bad faith in its dealings. They contend that United (and Pennzoil) deliberately set out to create a gas shortage in order both to create a market, specifically in power plants, for higher-priced fuel oil and to increase the market price of natural gas. There is much record support for that contention. Were that established, United might be estopped from arguing its own fault and its high-price consequences as a defense to a demand by NOPSI for maximum contract requirements. The trial judge explicitly found, however, that United was not in bad faith in its actions and, whether or not that might have been our own inference, we cannot say that that inference is so unsupported by the record as to be clearly wrong. "[W]here there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even

though the appellate court may feel that its own evaluations and inferences are as reasonable." *Canter v. Koehring Co.*, 283 So.2d 716, 724 (La.1973).

But, to repeat, NOPSI was also bound to good faith dealing, in the exercise of its contractual right to its requirements. Our conclusion is that NOPSI was not entitled to demand anything more than its normal requirements, including increase in demand by area customers old and new, and perhaps, to the extent of NOPSI's usual participation, including similar increase in sibling utilities' area customers' demand. NOPSI was entitled to all of its customary requirements (within specified limits), including requirements not only for sales to its customers within its geographical area but also for its historical practice of sales to siblings and through the Middle South exchange to off-system utilities. But it was clearly not entitled to sell to other utilities its contract rights to cheap United gas. We conclude that it is equally not entitled in effect to do so by converting the gas into electricity for unprecedented direct sales outside the Middle South system.

The question is whether, when fuel costs skyrocketed, the "requirements" contract entitled NOPSI to the full limit of the specified maximums of United's cheap gas and therefore to the profits that NOPSI could have made with that cheap gas.

United points out that the quantities on which NOPSI calculates its claim could only be generated if NOPSI ran its generators at a capacity factor of over 81% (which, United also argues, would have burned more gas than the contract's maximum daily delivery obligations). United does not show physical impossibility of operating year-round at 81% of capacity, but it does make NOPSI's claim somewhat doubtful. A theoretical capacity factor of 100% would require all generators to run at top capacity every minute of the year, with no stops for maintenance or repair. NOPSI's capacity factors before curtailment rarely exceeded

50% and never exceeded 58%. Thus NOPSI's claim is based on sales that would increase generation by perhaps half or more. (An increase from 50% to 80% of capacity would be 60% of the original 50%).

C.A. Andrews C. Co. v. Board of Directors of Public Schools, 151 La. 695, 92 So. 303 (1922), considered the problem of a buyer's demands for unprecedented "requirements." In that case, the school board in May 1916 invited bids for a year's supply of each of anthracite and bituminous coal, estimating annual consumption at 500 tons of anthracite and 1,000 tons of bituminous, but reserving the right to order more or less depending on "actual requirements." Plaintiff successfully bid to supply the bituminous coal at $3.75 a ton. Thereafter, the school board abandoned anthracite as a fuel. The market price of bituminous increased to $6 a ton by Fall 1916. Because consumption was double what it expected, plaintiff notified the board that it would not deliver beyond 1,200 tons at the contract price. The suit was for the excess of market over contract price, on the coal delivered in excess of 1,200 tons. Reversing a trial court judgment refusing recovery, the supreme court reasoned:

> "If the board had continued the use of both kinds of coal . . . the plaintiff would not have been required to deliver more than 1,200 tons under its contract. That amount was the 'average annual consumption' . . . and would have sufficed to meet the 'actual requirements. . . .'
>
> "[The use of both coals] must be regarded therefore as having been taken into consideration at the time of the contract, and . . . the plaintiff in . . . obligating itself to deliver 'all the coal required by the public schools' did not contemplate, and had no reason to anticipate that the school board would thereafter change the method of heating the schools, and that it (plaintiff) would be called upon under its contract

> to make delivery, by reason of the substitution of all bituminous for anthracite coal. . . . If, as a matter of fact, the increased consumption had been due to weather conditions, or to the enlargement or expansion of school buildings, or to increased school attendance, then clearly the plaintiff would have been required to make deliveries to meet such conditions. The increment of coal would have come within the meaning of the term, 'actual requirements. . . .' But that is not the case. The increased requirement was not the result of any of the conditions named, nor due to any cause within the contemplation of the parties at the time of the contract, but was brought about by the action of the school board in discontinuing the use of [anthracite].
>
> "Our conclusion is that the school board was not at liberty to arbitrarily change the conditions prevailing at the time of the contract . . . and to thereby impose upon the plaintiff the obligation of delivering the additional coal required on account of such changed conditions."

Notwithstanding the presence in the United contract of specified limits upon NOPSI's "requirements," we conclude that the contract intended no more than to supply NOPSI's customary usages. Customary usages allow some unusual increases, as, for example, if an unusual increase were required because a giant industry using great quantities of electricity were to locate within NOPSI's area. NOPSI's "requirements" would include gas to produce electricity for that new consumer. The specified contractual limits on requirements are not intended, however, to make the term requirements superfluous, or to displace the ordinary understanding of the term, as set forth in *Andrews*. The limits are intended, instead, to protect against an increase still within "requirements" but not provided for by ordinary capacity or ordinary planning (as

in our hypothetical case of a giant industry's moving into NOPSI's area).

NOPSI's claim for lost profits on sales to off-system utilities is not within requirements because not within the normal growth of the demands of its regular consumers (including other utilities). NOPSI's claim is that, with all utilities obliged to pay extremely high fuel costs, it could have made a theoretical windfall by selling cheap electricity. One who owes requirements does not owe a windfall. The trial judge correctly rejected this claim.

On Sales to Area Customers

NOPSI charged a base rate authorized by the governmental rate-fixing agency, and included in that base rate was NOPSI's profit. NOPSI added to the base rate, by the fuel adjustment clause, the increased cost of fuel, upon which it made no profit. The result was a sharply higher total price of electricity. NOPSI contends that, because of the higher price, its customers bought less electricity than they would have, and that NOPSI lost profit of $6,390,892 on the difference between actual sales during United's breach and the sales that NOPSI had projected. NOPSI did present some evidence (including testimony by some New Orleanians of their own reduction in use because of higher prices) that higher prices would reduce consumption of electricity. And, indeed, some (but, United insists, not all) classes of consumers did decrease usage. NOPSI therefore claims $6,390,892 as an item of damage expressly within La.C.C. 1934's measure of damage as, in part, "the profits of which [one] has been deprived."

The trial judge rejected this claim, citing uncertainty in NOPSI's projections of anticipated increase in sales, and also citing energy conservation campaigns and an economic recession after the Arab oil embargo, both of which presumably decreased consumption of electricity.

Our strong suspicion that, as some individuals testified, high prices reduced consumption does not amount to a

conviction that the trial judge was clearly wrong in rejecting this claim. We are unable to fix with certainty even any portion of the projected loss as more probable than not. We therefore affirm the trial judge's disallowance of this item.

DECREE

The judgment in favor of Louisiana Power and Light Company against United Gas Pipe Line Company is affirmed but its quantum is increased by $49,674,861 to $89,984,003 with pre-judgment legal interest upon the several items of damage at the rates and from the times provided in the body of this opinion, and the judgment's provision for deposit into the court is deleted.

The judgment in favor of New Orleans Public Service, Inc. and the class of its ratepayers against United Gas Pipe Line Company is affirmed but its quantum is increased by $2,007,819 to $46,410,925, with pre-judgment legal interest as provided for LP & L.

United is to pay all of its own costs and 85% of LP & L's costs and 90% of NOPSI's (and the class's) costs. Other parties are to pay their own costs.

APPENDIX B

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans JAN 19 1988

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

CITY OF NEW ORLEANS, ET AL VS. UNITED GAS PIPE LINE CO. CONSOLIDATED WITH LP&L VS. UNITED GAS PIPE LINE CO., ET AL No. CA-3613-3614

Very truly yours,

(THREE APPLICATIONS)
DANIELLE A. SCHOTT
CLERK OF COURT

APPENDIX C

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 575-544 DIVISION "J" DOCKET NO. 4

CITY OF NEW ORLEANS, *et al.*

versus

UNITED GAS PIPE LINE COMPANY

NO. 579-040 DIVISION "J" DOCKET NO. 4

LOUISIANA POWER & LIGHT COMPANY

versus

UNITED GAS PIPE LINE COMPANY

REASONS FOR JUDGMENT

United Gas Pipe Line Company ("United") is a natural gas transmission company, organized in 1937, that purchases gas predominantly from independent, non-affiliated gas producers, transports the gas through its pipeline system, and then sells the gas to customers for their own use (commonly called "direct sales") or for resale to their customers (commonly called "sales for resale"). Since 1937, (and prior to that time through predecessor companies), United has operated a single, interconnected natural gas pipeline system in all or portions of the States of Louisiana, Texas, Mississippi, Alabama and Florida, a region often referred to as the "Gulf South". During the 1960s and 1970s, United served several hundred direct and resale customers in Louisiana, including New Orleans, and over 250 smaller communities, as well as customers in other portions of the Gulf South.

New Orleans Public Service Inc. ("NOPSI"), a wholly-owned subsidiary of Middle South Utilities, Inc., is both a resale and direct sale customer of United. As a resale customer, NOPSI engages in the distribution of gas throughout the City of New Orleans and, as a direct sale customer, NOPSI uses the gas from United to generate electricity that is transmitted and sold in the City of New Orleans and elsewhere. NOPSI has brought suit against United only in its capacity as a direct sale customer.

The City of New Orleans ("City") is one of NOPSI's consumers of electricity and, acting through its City Council, established NOPSI rates for electricity up to January 1, 1982. The "Class" purports to comprise all persons and organizations purchasing electricity from NOPSI from January 1, 1973 through June 1, 1975. With respect to the class action, on March 31, 1983, this Court certified the Class of Electric Ratepayers of NOPSI, finding that the persons constituting the Class (about 187,000) are so numerous as to make it impracticable for all of them to join individually as parties; that the character of the rights sought to be enforced for the Class members are common to all such members; that Blake Arata, David Cressy, Jacob Taranto III, the City of New Orleans and the State of Louisiana insure the adequate representation of all Class members; that a class action is superior to other available methods for the fair and efficient adjudication of the claims of the class members; that the Class members meet all requirements set forth in Code of Civil Procedure, Articles 591 *et seq.* and of the jurisprudence of this state, and that the Class representatives fulfilled due process requirements pertaining to proper and due notice to the Class members, by forwarding to each Class member a class action notice in July-August, 1974, January-March, 1982 and by causing the publication of a notice in the Times-Picayune of February 21, 1982. This Court further found that until further notification, no further notice was nec-

essary at such time. This court reaffirms the certification of the Class.

Louisiana Power & Light Company ("LP&L") is a direct sale customer of United that uses the gas delivered by United as fuel for the generation of electricity in LP&L's steam electric generating stations.

The Louisiana Public Service Commission ("LPSC") is an agency of the State of Louisiana vested with the responsibility, *inter alia,* for regulating LP&L's electric utility rates.

For a portion of the trial, Gulf States Utilities Company ("Gulf States") was included as a party to this proceeding. Gulf States, like LP&L, is a regulated electric public utility company subject to the regulation of the LPSC at all times pertinent to this proceeding. Gulf States has been dismissed from the proceeding pursuant to a settlement agreement with United. However, evidence sponsored at trial by witnesses called by Gulf States or introduced by Gulf States was submitted on behalf of the plaintiffs and LPSC and, where appropriate, has been considered by the Court in its deliberations.

The Court has jurisdiction over the parties and jurisdiction to determine the ultimate and controlling issues in the case and to grant the relief petitioners seek.

The contract on which this action was brought by NOPSI and the City/Class, executed on July 21, 1952, obligated United to sell and deliver to NOPSI for a term ending on June 1, 1975, (a) NOPSI's total requirements of gas for resale from its distribution system in Orleans Parish (resale gas), and (b) NOPSI's total requirements for gas as fuel at its two electric generating plants in Orleans Parish and any other electric plants thereafter constructed and operated in Orleans Parish (power plant gas), not to exceed, however, 125,000 Mcf of power plant gas or 270,000 Mcf of resale and power plant gas in any one day. The

price NOPSI agreed to pay for power plant gas during the initial period ending June 1, 1960 was 13 cents per Mcf, less one-half cent per Mcf United agreed to pay NOPSI for tranpsorting the power plant gas in its distribution system from United's pipeline metering facilities to NOPSI's power plants. For the contract volumes of power plant gas delivered each consecutive five-year period, NOPSI agreed to pay United a price per Mcf to be thereafter determined in accordance with a formula in the contract.

The rates per Mcf NOPSI agreed to pay for the contract volumes of resale gas delivered during the term of the contract were the rates fixed from time to time by the LPSC which had jurisdiction under the laws of Louisiana over United's sales of gas in intrastate commerce for resale and over its intrastate pipeline system in Louisiana through which the resale gas was transported and delivered into NOPSI's local distribution system. The contract expressly provided that it would not become effective in whole or in part unless and until the LPSC approved an attached rate schedule. On August 13, 1952, United filed with the LPSC an application for approval of the contract and attached rate schedule which the Commission approved on February 24, 1953 with some modifications in the rate schedule, and the parties approved on April 1, 1953. Deliveries began under the contract on March 23, 1953.

Numerous amendments were made to the contract at various times increasing the prices NOPSI agreed to pay for power plant gas and enlarging the volumes of power plant and resale gas United agreed to deliver to NOPSI. In a letter agreement dated May 31, 1960, the parties agreed on a higher price NOPSI would pay for power plant gas delivered during the five-year period June 1, 1960 to June 1, 1965. In a subsequent letter-agreement dated April 28, 1965, they agreed on a price of 22 cents per Mcf for power plant gas sold and delivered during the five-year

period commencing on June 1, 1965 at 7:00 o'clock A.M. and terminating on June 1, 1970 at 7:00 o'clock A.M., and a price of 23 cents per Mcf for power plant gas sold and delivered during the last five-year period of the contract commencing on June 1, 1975 at 7:00 o'clock A.M. They also agreed that the prices of 22 cents per Mcf and 23 cents per Mcf for power plant gas were based on the volumes of power plant gas delivered during a billing month containing a weighted average of 1078 British Thermal Units (Btu) per Mcf, that when the weighted average Btu content of the power plant gas exceeded 1078 Btu per Mcf the price per Mcf would be increased proportionately, and when the Btu content was less than 1078 Btu per Mcf the price per Mcf would be decreased proportionately. Subsequently January 31, 1975 the parties in a letter-agreement dated January 31, 1975 further agreed that for the period commencing on January 1, 1975 at 7:00 o'clock A.M. NOPSI would pay United for power plant gas sold and delivered during the remaining four months of the last five-year period a price per Mcf equal to United's weighted average cost per Mcf of purchased gas.

Pursuant to the provisions of the contract NOPSI, on various dates in the period 1952 to 1970, requested United in writing to increase the maximum daily quantities (MDQ) of resale gas and the MDQ of power plant gas, thereafter sold and delivered to NOPSI under the contract, to which requests United consented in writing as shown by the following letter agreements dated: (a) November 17, 1952 increasing the MDQ from 270,000 Mcf to 300,000 Mcf; (b) November 7, 1957 increasing the MDQ from 300,000 Mcf to 325,000 Mcf; (c) October 26, 1959 increasing the MDQ from 325,000 Mcf to 340,000 Mcf; (d) September 21, 1960 increasing the MDQ from 342,700 Mcf to 354,500 Mcf; (e) August 9, 1961 increasing the MDQ from 354,500 Mcf to 369,500 Mcf; (f) October 1, 1962 increasing the MDQ from 369,500 Mcf to 377,000 Mcf; (g) April 15, 1965 increasing

the MDQ of power plant gas from 125,000 Mcf to 169,000 Mcf and further increasing the MDQ of power plant gas in 1967 from 169,000 Mcf to 292,920 Mcf when NOPSI completed and commenced operating a new electric generating unit at its Michoud plant; (h) August 12, 1965 increasing the MDQ from 377,000 Mcf to 392,000 Mcf; (i) August 12, 1966 increasing the MDQ from 392,000 Mcf to 422,000 Mcf; (j) December 15, 1967 increasing the MDQ from 422,000 Mcf to 434,000 Mcf; (k) September 18, 1969 increasing the MDQ from 434,000 Mcf to 448,000 Mcf; and (l) September 14, 1970 increasing the MDQ from 448,000 Mcf to 477,400 Mcf.

On February 20, 1956, LP&L and United entered into a contract entitled "Gas Sales Agreement" ("The Sterlington Contract") whereby United agreed "to sell and deliver or cause to be delivered" to LP&L and LP&L agreed "to purchase and receive" from United, natural gas for use in LP&L's Sterlington Steam Electric Generating Station. The Sterlington Contract provided that "[t]his agreement shall be for a term commencing on March 26, 1958, at 7:00 A.M. and shall end on April 1, 1978 . . ." United was obligated to sell and deliver natural gas for all of LP&L's requirements for its Units Five and Six at Sterlington not in excess of 50,000 Mcf in any one day.

On December 2, 1969, United and LP&L amended the Sterlington Contract to provide for a sales obligation for a portion of the requirements of the Sterlington Station not in excess of 30,000 mcf per day during calendar year 1970 and not in excess of 25,000 mcf per day during the calendar years 1971 through 1974. The term of the Sterlington Contract remained unchanged and thus extended through April 1, 1978.

On December 31, 1974, after LP&L had filed its lawsuit herein, United and LP&L entered into an amendment to this contract to provide for a new monthly rate through the expiration of the contract term of April 1, 1978. The

amended Sterlington Contract continued to provide for sales and delivery of 25,000 mcf per day maximum. At United's insistence, this contract purported to recite that the amount of United's delivery obligation would be subject to its Federal Power Commission ("FPC") tariff, a point then disputed by United and LP&L in this lawsuit, but the parties specifically reserved all pending claims that they had prior to the signing of this amendment. The Court finds that United's delivery obligation was a portion of LP&L's requirements not in excess of 25,000 mcf per day through April 1, 1978, and that United's deliveries to LP&L under the Sterlington Contract were in interstate commerce and subject in part to regulation by the FPC. The Sterlington Contract was a direct industrial sales contract, or "non-jurisdictional" contract to the extent that rates and other terms were set by negotiation.

On May 6, 1968, United and LP&L entered into a contract entitled "Gas Sales Agreement"("The Ninemile Point Contract"), whereby United agreed "to sell and deliver" and LP&L agreed "to purchase and receive" all of the fuel requirements for the operation of LP&L's Ninemile Point Power Plant Units 1, 2, and 3, not to exceed 125,000 mcf per day until LP&L placed its new Unit Four into commercial operation and thereafter 33 1/3% of the fuel requirements of LP&L's entire Ninemile Point Power Plant, not however, to exceed 80,000 mcf in any one day to January 1, 1993. The Ninemile Point contract was a novation of an earlier contract between LP&L and United which had been submitted to the Louisiana Public Service Commission for approval. United's deliveries to LP&L under both of these contracts were through its Lirette-Harvey line which was part of its Louisiana intrastate pipeline system referred to in this trial as "New Orleans District 5" until United sought to certificate this system as part of its interstate system.

Initially, the Court is of the opinion that the NOPSI-United gas sales contract and all amendments are valid

and binding agreements. Likewise, the LP&L-United Nine Mile Point Contract and Sterlington Contract and all amendments are valid and binding agreements.

During the period April 1, 1971 to June 1, 1975, United did not sell and deliver the total contract quantities of power plant gas NOPSI required as fuel in generating electricity at its Paterson, Market Street and Michoud steam electric stations in Orleans Parish.

Sometime in October of 1970, United notified LP&L that it would be unable to deliver the contracted-for quantities of gas under the Ninemile Point Contract and Sterlington Contract, as amended, and on October 26, 1970, United made a filing with the FPC in which it declared that it was unable to deliver in full to all of its customers and that it would begin to allocate deliveries among its customers. Thereafter, United failed to deliver the contracted-for quantities of gas to LP&L during the years 1971-1981 inclusive, as provided for in the Ninemile Point and Sterlington Contracts, as amended.

The ultimate issue presented by the breach of contract claims alleged by the plaintiffs is whether United's failure to deliver the quantities of gas under contract constituted a breach of United's delivery obligation under the contract or do the contracts provide for a reduction of United's delivery obligation during a shortage of natural gas.

The NOPSI contract was a contract for the sale and delivery to NOPSI of resale and power plant gas in intrastate commerce from United's New Orleans District Five intrastate system over which the LPSC exercised exclusive jurisdiction. United, however, began in July 1965 delivering some gas into one of the lateral lines of the intrastate system from its interstate system and continued such deliveries into other segments of the intrastate systems until October 1970. In October 1970 United applied to the FPC for a certificate authorizing it to operate the intrastate system as a part of its interstate system on

which it then had a gas shortage. NOPSI opposed the application, but the FPC granted the application in July 1973 on the ground that the FPC acquired jurisdiction over the intrastate system by United delivering substantial quantities of interstate gas into the intrastate system in the 1965-1970 period.

The evidence shows that United released a majority of its dedicated intrastate gas reserves in the 1963-1967 period. Additionally, United's policy of not purchasing major new reserves in the 1960's, its increased gas sales, and its attaching the intrastate system to its interstate system on which it then had a gas shortage caused the shortage that subsequently developed on the New Orleans District Five system in the 1970's. United needed the gas reserves it had released to meet its gas sales contract obligations. United should not have improvidently released a substantial part of the reserves, and then failed to promptly replace them. The evidence clearly shows that, had United continued operating the New Orleans District Five system as an intrastate system, and had it not improvidently released in the 1962-1965 period a large part of its dedicated gas reserves attached to the intrastate system, and had it pursued a policy of purchasing in the 1960's and 1970's dedicated gas reserves available to intrastate pipelines, it would have had adequate gas reserves to sell and deliver to NOPSI the contract quantities of gas until June 1, 1975, the date the 1952 contract terminated, and it would not have experienced a gas shortage throughout the 1970's on its intrastate system.

After United applied to the FPC to issue an interstate certificate for United's Louisiana intrastate system, United filed with the FPC a petition declaring there was a shortage of gas on its interstate system and stating that United would allocate deliveries among its interstate customers. Beginning in 1971, United failed to deliver full contract quantities of gas to LP&L. Indeed, United failed to deliver

the contract quantities of gas to LP&L during the years 1971 through 1981.

Any shortage of gas in the 1970's on United's interstate system which may have rendered it incapable of selling and delivering to LP&L the contract quantities of gas was caused by United's improvident actions. In the 1960's United released large volumes of dedicated remaining recoverable gas reserves attached to its system. In addition, United failed to purchase and attach to its systems new dedicated gas reserves that were available in the 1960's and 1970's. Furthermore, United increased its sales of gas during the 1960's without correspondingly attaching adequate new gas reserves to supply the increased sales although it had insufficient reserves to supply these obligations and meet its existing customer requirements. All of these actions proved to have an impact on United's ability to meet the needs of its customers and comply with its contract obligations.

The record reflects that United also failed to ensure the adequacy of supplies on its New Orleans District Five intrastate system. United improvidently released large volumes of dedicated remaining recoverable gas reserves attached to its New Orleans District Five intrastate system in the 1960's. Moreover, it failed to attach to its intrastate system, new dedicated gas reserves that were available in the 1960's and 1970's. In addition, in the 1965-1970 period, United injected volumes of gas from its certificated interstate system into its District Five intrastate system, thus subjecting the intrastate system to the FPC jurisdiction and the weaknesses of the supply-shortened interstate system. Any shortage of natural gas which may have developed on United's New Orleans District Five system thus could have and should have been foreseen by United.

United contends that delivery obligations under the contracts in question are "subject to the terms, conditions and limitations" of the contracts.

One of the "terms, conditions and limitations" in the contracts is sometimes referred to as the "impairment of deliveries" or "public utility" clause which provided for reduction of United's delivery obligation by stating that, "[i]n the event a shortage of gas renders Seller (United) unable to supply the full gas requirements of all of its customers, including Buyer (NOPSI or LP&L), . . ." United was to first supply the gas requirements of domestic gas users before supplying any gas to NOPSI or LP&L for power plant use and then was to prorate the remaining available gas among NOPSI, LP&L and other customers based on the priorities set forth in the clause. This contract provision therefore reduced the amount of gas that would be delivered to NOPSI or LP&L during time of shortage.

On December 31, 1974, LP&L and United amended the "impairment of deliveries" clause of the Sterlington contract to provide as follows:

> The section entitled 'Impairment of Deliveries' of the General Terms and Conditions of United Gas Pipe Line Company's (Seller's) Federal Power Commission Gas Tariff is incorporated herein by reference and for purposes of this agreement shall be treated as if it were set out in full. It is recognized that such section may be changed, amended or revised from time to time and it is agreed that such changed, amended or revised Impairment of Deliveries provisions under the Gas Tariff will also apply hereunder as they occur and shall be effective immediately without prior notice, written or otherwise, to Buyer. It is agreed, however, that Seller will provide Buyer with a copy of any changes in the Impairment of Deliveries clause of the Gas Tariff as soon as practicable.

Another one of the "terms, conditions and limitations" in the contracts affecting United's delivery obligation is

sometimes referred to as the "duly constituted authorities" clause and subjects deliveries of gas to LP&L to the possible exercise of federal or state regulation by providing:

> This agreement is especially made subject to all present or future valid rules, regulations or orders of any commission or regulatory body having jurisdiction.

Another one of the "terms, conditions and limitations' in the contracts was the "*force majeure*" clause, which defined *force majeure* as a series of enumerated causes "and any other causes . . . not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome . . ." and provided for suspension of United's delivery obligation when United was ". . . rendered unable wholly or in part by force majeure to carry out its obligations . . ." for such period as was required to remedy the *force majeure* event.

Although the Sterlington contract was amended from time to time, the "terms, conditions, and limitations" noted above were never amended except for the 1974 amendment to the "impairment of deliveries" clause. The 1968 Ninemile contract has never been amended.

The contract terms governing United's delivery obligations during a natural gas shortage are to be considered in light of the intent of the parties in accordance with applicable state law.

The contracting parties focused on the contracts' "terms, conditions and limitations" prior to executing the contract. For example, in the negotiations leading to execution of the NOPSI and LP&L contracts in 1952 (the contracts were negotiated in concert), United rejected proposals to limit the impairment of deliveries clauses (a) to a shortage in United's "New Orleans District", (b) to a "temporary

shortage" or (c) to a shortage limited to *force majeure* conditions.

United's failure to deliver the contract quantities of gas to LP&L and NOPSI was not the result of force majeure, or any other cause or causes not within United's control, or which United could not prevent or overcome by the exercise of due diligence. In the exercise of due diligence, United could have prevented the gas shortage it experienced on its systems in the 1970's (a) by retaining instead of releasing in the 1960's large volumes of dedicated gas reserves then attached to its systems; (b) by purchasing and attaching additional gas reserves to its systems that were available at economic prices; (c) by not increasing sales of gas in the middle and late 1960's when United was simultaneously reducing its dedicated gas reserves; and (d) by maintaining a reasonable balance between dedicated gas supplies and contract demands of its customers.

United's management was imprudent in permitting its gas supplies to dwindle, relative to its delivery obligations, to an amount that did not permit adequate service to customers. Management failed to take adequate steps to determine the implications of its actions or to assure an adequate supply to meet the obligations of the company. United's management relied on its ability to contract in the 1970's for supplies sufficient to meet obligations undertaken in the 1950's and 1960's.

At the time that United entered into its contracts with NOPSI, LP&L, and its other customers, United knew that it did not have enough gas under contract to meet its delivery obligations for the life of those contracts. United was aware of an increasing competition for new reserves. By promising to sell gas that it did not own, United knew or should have known that there was a risk that it would not be able to get gas at favorable prices to meet increasing demands or obligations. However, United managed its system on the assumption that it could always get addi-

tional gas in the future whenever needed, wherever needed and at an advantageous price to meet the obligations already committed. This same philosophy was repeated annually in United's statements to the FPC in its Form 15 filings with the FPC—that new reserves were available and would be added as needed.

The Article in the contracts, generally referred to during the trial as the "impairment of deliveries clause" does not, and was not intended to relieve United of liability for its failure to deliver to LP&L and NOPSI the contract quantities of gas. The articles relieve and were only intended to relieve United of liability for failure to deliver supplies when there is a gas shortage which resulted from one or more force majeure causes enumerated in the other provisions of the contracts, *and* where United prorated its gas supplies between its customers in the order of priorities enumerated in the articles, and not some different order of priorities. Therefore, the prerequisites have not been met. Furthermore, as indicated above, United's own improvident actions were the reason for governmental orders for prorated deliveries of gas.

No fortuitous event or irresistable force prevented United from supplying LP&L and NOPSI the contract volumes of power plant gas. United's gas shortage was not a fortuitous event. The shortage developed in the 1960's when United released large volumes of dedicated gas reserves, ceased purchasing new reserves and increased its sales of gas. Nor did any irresistible force prevent United from purchasing new gas reserves or balancing supply and demand.

Though it was compensated (through the prices bargained for and included in its sales contracts) for the risk of having to acquire new gas supplies to meet contract obligations, United did not act prudently to ensure an adequate supply. As a result of United's improvidence, United became incapable of meeting its contract obligations for

deliveries of gas and NOPSI, LP&L and the ratepayers of these companies had to pay more for the energy that United had contracted to deliver.

The shortage on United's system was neither an implied "resolutory" condition nor an implied "suspensive" condition of any of the contracts herein. In addition, none of the contracts was a "divisible installment" contract. United is not exculpated from liability on any of these grounds.

The performance of the contracts was not excused in whole or in part by the failure of any "cause" or "consideration or motive" for making the contract.

The Court is of the opinion that United's failure to deliver NOPSI the contract quantities of power plant gas during the period November 1, 1970 to June 1, 1975 breached its contract as amended with NOPSI.

The Court is further of the opinion that United's failure to deliver to LP&L the contract quantities of natural gas during the period 1971-1981 breached its contracts as amended with LP&L.

No tariff filed by United with the FPC or the Federal Energy Regulatory Commission (FERC) exculpated or exonerated United from liability for breach of its contracts with NOPSI and LP&L. Whether or not United's partial deliveries to NOPSI and LP&L during the period of United's breaches were pursuant to a "curtailment plan" for United's system made effective or allowed to be made effective by United, the FPC, the FERC, or the United States Courts, whether such plans were approved or not, or held lawful or unlawful, presents no defense to United's breaches of its contracts with NOPSI and LP&L.

Plaintiffs allege that defendant United was in bad faith when United breached its respective contracts.

Beginning in late 1969, when United first recognized the possibility of peak day shortages, it began to advise

its customers of the situation. In early and mid 1970, it maintained contracts with its customers and with the FPC to apprise them of potential gas supply problems. The record in this case does not establish that United at any time deliberately misrepresented the amount of gas supplies that it owned or had under contract or its ability to meet the requirements of NOPSI or LP&L. It was United's belief and expectation that gas supplies would be available to it in the future in sufficient quantities to enable it to meet the requirements of all its customers. However, United's beliefs and expectations did not materialize. Any actions taken by United and its management based on expectations that gas supplies would be available in the future in sufficient quantities were not willfully intended or calculated to lead to breach of its gas supply contracts with NOPSI and LP&L.

United's deliveries in the New Orleans area through its District 5 facilities are extremely "temperature sensitive", i.e., they fluctuate substantially and frequently depending upon the temperature in the New Orleans area. Because of the unavailability of storage facilities, the problems involved in rapidly varying the volumes of field deliveries of gas and the economics of constructing new pipeline facilities to operate at low load factors, United was unable to utilize all available capacity from fields exclusively connected to District 5 facilities to meet demand in the New Orleans area. Commencing in 1965, United needed to use and did use gas from its New Orleans District 6 facilities to help serve customers in this area. During the 1950s and 1960s, it was United's policy that District 6 gas could be used in District 5 if it was required to serve customers in the New Orleans area. During the period 1966-1970, United disclosed its flows of interstate gas into the former district 5 facilities in annual reports submitted to the FPC and in certificate applications filed with the FPC. United sought and received FPC approval to use interstate gas to serve a new customer in District 5 and to connect its

District 5 facilities with those of another interstate pipeline. United also operated certain fields in South Louisiana, sometimes referred to as "swing fields", that could deliver gas into either District 5 or District 6. During the 1950s and 1960s, gas from the swing fields was needed to serve United's requirements in the New Orleans area. United's swing field operations were well-known by the producers that sold gas to United in the New Orleans area and were disclosed by United and by the producers to the FPC.

By virtue of a decision known as the "Florida Parishes" case, the FPC affirmed its jurisdiction over United's sales for resale in a portion of Louisiana north of Lake Pontchartrain (but not District 5) on the ground that the gas used to serve the communities in question, although produced, transported and consumed in Louisiana, was "commingled" with gas that crossed the Louisiana state line and hence was in interstate commerce. The FPC's decision was affirmed by the courts and became final in 1966. In 1966 and 1967, United conducted a review of its system to determine the possible impact of the "Florida Parishes" decision on the jurisdictional status of facilities and sales on other portions of its system, including District 5.

On October 1, 1970, United applied to the FPC for issuance of a certificate of public convenience and necessity with respect to various portions of its system, including District 5, that had been treated as not subject to FPC jurisdiction. The matter was designated Docket No. CP71-89 and hearings were conducted on the application. NOPSI, LP&L and the LPSC were parties to this proceeding. In Opinion No. 610, the FPC found that "United has introduced significant quantities of interstate gas into its Lafayette and New Orleans facilities and has commingled uncertificated and interstate gas supplies since 1965", and that "were it not for deliveries of interstate gas in the past years, the system would have been unable to meet its peak day requirements." The FPC further found that the former district 5 facilities became subject to federal

jurisdiction in 1965 when "the commingling of interstate and intrastate gas took place." The FPC's findings were affirmed on appeal. Subsequent to its finding of jurisdiction in Opinion No. 610, the FPC in a separate decision granted United a certificate of public convenience and necessity for, *inter alia,* the District 5 facilities. The United States Court of Appeals for the District of Columbia affirmed this decision, stating in part:

> Beginning about 1965 the independent gas reserves which United had relied on to operate the New Orleans Division declined and became inadequate to serve the intrastate markets of that division. Accordingly United began transferring gas from its interstate facilities to the intrastate facilities in the New Orleans Division. The first transfer occurred on July 25, 1965.
>
> (*State of Louisiana v. FPC,* 533 F.2d 1239, 1241 (D.C. Cir. 1976).)

The Court is of the opinion that United's use of interstate gas in its District Five facilities in the New Orleans area was not motivated by ill will but was in furtherance of its delivery obligations under the contracts. The Court sees no direct evidence to support plaintiffs' allegations of improper motive and conduct with respect to United's actions which subjected the sales, service and facilities in District Five to federal jurisdiction. The record in this case does not establish that United abused the jurisdiction of the FPC, or that such alleged abuse was intended to permit United to breach its contracts with NOPSI or LP&L.

Although curtailment tariffs and FPC/FERC curtailment orders would ordinarily exculpate a pipeline from contractual liability for curtailments, such tariffs and orders in this case will not exculpate United from its liability herein because the Court is of the opinion that United's shortage of supply was induced by the unrealized expectations and imprudent decisions of United and its management.

In conclusion, the record does not support the plaintiffs' claims that United breached its contracts with NOPSI and LP&L in bad faith.

Plaintiff's allegations of United's bad faith with respect to United's decision to form a separate interstate company in Texas are neither relevant or material in view of the Court's opinion that United was in good faith and did not breach its contracts from some motive or ill will.

The record in this case does not support the maintenance of a tort action by the City and Class.

The record does not further support the claim of *Actio de in rem verso* brought by the City and Class.

As this Court has found United liable for a good faith breach of the contracts with NOPSI and LP&L, United is liable for certain items of damages incurred by plaintiffs.

The supremacy clause of the United States Constitution does not preclude plaintiffs from recovering damages claimed in this action, nor does the clause require this court to await the FERC's determination of issues in Phase III before awarding damages to plaintiffs. No tariff filed by United with the FPC or the FERC will bar plaintiffs' recovery of damages.

No curtailment orders or plans promulgated by the FPC or FERC or curtailment plans proposed by United and approved by either Commission will bar plaintiffs' right to recover damages for breach of the contracts in suit.

The effect of a judgment on the defendant's fiscal viability is not a proper matter for consideration by this Court in a contract action such as this.

Article 1934 of the Louisiana Civil Code provides the measure of damages for breach of contract and recites, *inter alia:*

> "Where the object of the contract is any thing but the payment of money, the damages due to

> the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived, under the following exceptions and modifications:
>
> 1. When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. By bad faith in this and the next rule, is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill will."

During the trial NOPSI claimed damages from United of $43,176,713 for the cost of alternate fuel, $1,226,393 for increased franchise and gross receipts taxes, $8,031,276 for the cost of converting generating facilities, $6,728,180 as lost profits from lost area load, and $34,457,304 as lost profits from lost utility sales. Damages alleged total $93,619,866. The city of New Orleans and the Class of Electric Ratepayers ("City/Class") join as co-plaintiffs with NOPSI in claiming the damages set forth above. Claims herein are described as claims of NOPSI. The plaintiffs also claim interest from the date of judicial demand.

At the trial, United presented evidence directed toward reduction or elimination of each element of NOPSI's claims.

United contends that the NOPSI alternate fuel claim should be reduced by $37,159,951 to $6,016,762 due to the so-called "power plant preference" being abolished by the FPC in January, 1973.

As part of a series of curtailment plans, the FPC placed deliveries of power plant gas in a fourth or lowest category of priority. United contends that this action of the FPC exonerates it from liability for any increased fuel cost. Opinion 647 of January 12, 1973 (49 FPC 179) was issued in Docket RP 71-29, a proceeding before the FPC initiated

by United on October 26, 1970. The only reason for United's application was that it had developed a shortage of gas on its interstate system. It thus requested the FPC to allocate deliveries of its remaining inadequate gas supplies between its customers pursuant to a curtailment proposal included in its application. Subsequently, during the ensuing decade, a number of different plans were submitted by United for approval by the FPC. The FPC thereafter issued a series of orders allocating United's available gas supplies. Such orders were entered after vigorous participation in the proceedings by United and others. All such orders were appealed to the United States Fifth Circuit Court of Appeal, which ultimately held that the plans approved by the FPC were unlawful and not in the public interest; accordingly the Court remanded the proceedings to the FPC. Hence, Order 647 is but one in a series of orders the FPC issued as a direct result of United's shortage on its interstate system and application for governmental intervention. That order, too, was vacated in *State of Louisiana v. FPC,* 503 F.2d 844 (5th cir. 1974) over the opposition of United.

The Court is of the opinion that the shortage is the cause of the damages, not the action of the FPC in trying to deal with the results of United's shortage. The curtailment orders did not cause the shortage, United's imprudent management decisions caused its shortage. United's failure to deliver the contract volumes is not attributable to the FPC's curtailment plans proposed and supported by United. Its failure is due to a shortage of gas on its systems which United could have avoided by the exercise of due diligence.

The City, Class, NOPSI and United stipulated that plaintiffs incurred $43,176,713 in fuel costs and purchased power costs in excess of the cost they would have incurred had United supplied NOPSI for the benefit of the Ratepayers the volumes of gas needed to generate the quantities of electricity NOPSI sold to its New Orleans

Ratepayers. They further stipulated that the amount of $43,176,713 was recovered by NOPSI from its New Orleans Ratepayers under the fuel adjustment charge provisions of the tariffs approved by the City Council. Therefore, this amount was borne directly by the Ratepayers, and NOPSI, the City and the Class have agreed that such amount will be returned to the Ratepayers.

The Court is of the opinion that the damages for alternate fuel costs and purchased power costs in the sum of $43,176,713 is a proper and reasonable item of damages in view of the Court's finding that United breached its contract with NOPSI in good faith. The Court is further of the opinion that damages for alternate fuel costs and purchased power costs awarded herein may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract.

The parties also stipulated "... that the State of Louisiana by LSA - R.S. 47:106, has levied a tax upon the gross receipts of NOPSI at the rate of 2%; that the City of New Orleans, by Ordinance No. 4272 Mayor Council series has levied a tax upon the gross receipts of NOPSI (referred to as a Franchise Tax) at rate of 2.5%. The parties agreed that the excess fuel and purchased power costs [of $43,176,713] incurred in providing electricity to NOPSI's New Orleans Ratepayers resulted in increased gross receipt taxes being paid by NOPSI to the State of Louisiana in the amount of $146,975 and to the City of New Orleans in the amount of $1,079,418." There is no controversy about the fact that these taxes are a valid subject for recovery if liability is found.

The Court is of the opinion that damages for increased franchise and gross receipts taxes in the sum of $1,226,393 is a proper and reasonable item of damages in view of the Court's finding that United breached its contract with NOPSI in good faith.

NOPSI is making a claim against United for $8,031,276 for the cost of converting Michoud Units 1-3 and Paterson Units 1-4 to burn oil continuously.

NOPSI engaged consultants in 1970 to determine whether alternative gas suppliers could be secured for the period after 1975 but the consultants reported that no such suppliers would be available. NOPSI began planning to convert its units in March 1970, prior to notice of curtailment by United. In June 1970, before notice of curtailment by United, NOPSI's Senior Vice President ordered money to be put in NOPSI's long-range budget for conversion to oil. The NOPSI budget items for conversion show a target completion date of June 1975 and state that the purpose of conversion was to enable the units to burn oil after the expiration of the contract with United. Although a portion of the oil burning facilities was usable before June 1975, the conversion project was not completed until 1976.

The evidence reflects that NOPSI's management planned conversion of its generating units to oil burning capability. Furthermore, the Court is of the opinion that this conversion process was not within the contemplation of the parties at the time of the confection of the contract, or considered as a possible element of damages even if the contract was breached. Therefore, United is not liable for such damages.

NOPSI claims $6,728,180 in profits allegedly lost as a result of reduced sales to its area customers.

Plaintiffs base their claim for lost profits from lost area load on the difference between a projection of future sales of electricity made immediately before the Arab oil embargo of 1973 and subsequent sales of electricity during the period December 1973 - May 1975 that were below the prediction. Use of projections to show lost profits does not establish lost profits with reasonable certainty.

The evidence shows that reductions in sales of electricity were the result of patriotic campaigns at all levels of government for conservation of energy, advertisements promoting conservation, and an economic recession. Thus, NOPSI has failed to meet its burden of showing that the difference between the projection and actual sales, i.e., the alleged lost area load, was the result of United's breach of contract. Therefore, the loss of sales to NOPSI's area customers could not have been within the contemplation of the parties at the time the contract was entered into, and United is not liable for such damages.

NOPSI claims $34,457,304 in damages for profits it allegedly would have made on sales for its own account to utilities outside the Middle South system if United had not curtailed.

In the Middle South system, generating units are planned for the benefit of the system as a whole. Each company gets the benefit of its own cheapest generation and the next cheapest generation is to be made available to other Middle South companies at no profit. All Middle South companies are obligated to make available whatever low cost power they generate over and above their area load to sister companies at no profit. Sales by NOPSI directly to other utilities for its own account of low-cost energy generated on United's gas would have conflicted with the fundamental purpose of the Middle South system because such sales would have deprived the other Middle South companies of low-cost energy and thereby would have increased their costs.

Since NOPSI had never made or negotiated for any sales for its own account to other utilities or ever discussed with United the possibility that such sales might be made, the loss of profits due to NOPSI's inability to make such sales was not within the contemplation of the parties at the time the contract was executed. Therefore, United is not liable for such damages.

Accordingly, NOPSI and the City/Class should be awarded damages under their breach of contract claim in a total amount of $44,403,106. This award includes damages of $43,176,713 for alternate fuel costs and $1,226,393 for increased franchise and gross receipts taxes.

No damages should be awarded for conversion costs or lost profits.

No damages should be awarded under the tort or *actio de in rem verso* claim of the City and Class.

Although different amounts were claimed for various elements of damages in earlier pleadings, during the trial LP&L claimed damages from United of $78,523,963 for the cost of alternate fuel, $17,757,645 for the cost of converting generating facilities, $137,862,000 for the value of lost generating capacity, $5,126,760 for added maintenance expenses, and $1,648,481 for added operating costs. The total damages claimed by LP&L during trial was $240,918,849. LP&L also claims interest from the date of judicial demand.

At the trial, United presented evidence directed toward reduction or elimination of each element of LP&L's claim.

Because of the breach of contracts by United, LP&L's costs for fuel for generation of electricity increased. In order to supply electricity which would otherwise have been generated with gas supplied by United, LP&L either purchased power from other utilities or purchased other fuels to generate electricity (both referred to as alternate fuel during the trial). To measure the damages caused by the necessity to purchase alternate fuel or power, LP&L calculated the actual charges passed on to the Louisiana customers through the operation of the fuel adjustment clause and subtracted from that figure the amount that would have been paid by its Louisiana customers if United had delivered the full contract quantities of gas.

United claims a reduction of LP&L's alternate fuel claim due to the FPC's abolition of the "power plant preference".

Prior to January 1973, United's tariff and its contracts with LP&L provided that, in times of shortage, the requirements of United's power plant customers, including LP&L, for gas used to generate electricity for domestic use would be served before the requirements of some of United's other industrial customers. This provision is sometimes referred to as the "power plant preference". Approximately 50% of LP&L's requirements were in the power plant preference category. United's first curtailment tariff as made effective in 1952 contained the power plant preference. All tariffs proposed by United and/or made effective by the FPC between the commencement of curtailments in November 1970 and January 1973 included the power plant preference. On January 12, 1973, the FPC issued Opinion 647 which ordered United to eliminate the power plant preference from its curtailment tariff immediately. Pursuant to this order, the preference was eliminated on January 17, 1973.

The Court will adopt the reasons stated above with reference to United's proposed reduction of NOPSI's Alternate Fuel Claim based on the elimination of the power plant preference in denying any reduction of LP&L's alternate fuel claim based on the elimination of the power plant preference.

United claims a reduction of LP&L's claim for alternate fuel cost due to correction of error in LP&L's calculation of cost of generation using United gas at Ninemile Point in January 1977.

LP&L's damage claim is calculated by taking the cost of replacement energy sources allegedly used as a result of United's curtailments and subtracting the cost that LP&L would have incurred if United had delivered the gas needed to generate an equivalent amount of energy.

LP&L's work papers purport to show a price of energy generated using United gas at Ninemile Point for January 1977 calculated at 2.48 mills per kwh. Testimony reflects that generation of electricity on United's gas at this price would require an assumption that electricity was generated at a physically impossible heat rate; moreover, the calculated price is sharply lower than the calculated price for energy generated using United gas in other months. Accordingly, the calculated price is clearly a mathematical error. Testimony further shows that the correct calculation of the price of energy using United's gas cost for January 1977 is $7.92 per mwh (or 7.92 mills per kwh). If LP&L had made the correct calculation of United's fuel costs for January 1977, its claimed additional fuel costs (and its damage claim against United) would be reduced by $1,381,135.

$1,381,135 of LP&L's alleged additional fuel costs for January 1977 is attributable to an error in LP&L's calculations and not to United's breach of contract. As a result of the foregoing, LP&L's damages should be reduced by $1,381,135.

LP&L has included in its damage claim the cost of fuel used to generate energy for test purposes at Waterford Units 1 and 2, *i.e.*, the "test energy" that is generated to test a new electric generating unit prior to normal operation. Test energy is generated prior to placing a unit in commercial operation in order to assure that the unit operates properly. This test energy would have been generated by burning oil regardless of United's curtailments, and the fuel used to generate the test energy would have been burned regardless of United's curtailment. The exclusion from LP&L's claimed additional fuel costs of the cost of fuel used to generate test energy at the Waterford Station would reduce LP&L's damage claim by $1,522,137. The Court hereby allows this exclusion.

LP&L's claimed alternate fuel damages for the period prior to April 1975 include the fuel costs incurred by LP&L in generating energy for sale to other utilities. However, some of these costs would have been incurred even if United had not curtailed and are therefore not a result of United's breach of contract. LP&L has recovered from other utilities the fuel costs for which LP&L seeks damages. As a result of the foregoing, LP&L's damages should be reduced by $5,129,369.

United claims a reduction of LP&L's alternate fuel claim due to allocation of generation at Sterlington using gas supplied by Louisiana Gas Purchasing Corporation.

In August 1971, after United had begun to curtail, LP&L entered into a contract with Louisiana Gas Purchasing Corporation ("LGP") to purchase gas for use at its Sterlington station at a fixed price of 48 cents/Mcf or 46.8 cents per million Btu for a 20-year term. At the time of the LGP contract, August 1971, LP&L was already converting Sterlington Unit 6 to burn oil and Waterford Units 1 and 2 were under construction as oil burning units. Other oil burning units were being constructed on the Middle South system and all Middle South companies were converting units from gas-burning to oil-burning capability. It should have been clear to LP&L in 1971 that substantial amounts of oil generation would be used on the Middle South system and that generation at Sterlington using LGP gas would be cheaper than this oil generation.

Under the normal method of allocation in the Middle South system, LP&L would have been entitled to retain all energy generated from the LGP gas if that energy were cheaper than other energy sources available to it. Instead of allocating the LGP gas in the manner in which all other energy sources on the Middle South system were allocated, LP&L entered into a special arrangement with the other companies in the Middle South system to allocate the generation using LGP gas. As a result of this ar-

rangement, LP&L was limited to taking only approximately 35% of the generation using LGP gas. If LP&L had not entered into the special arrangement, it would have been able to displace many of the more expensive replacement energy sources contained in its damage claim against United and to reduce the overall fuel cost to its customers. It was imprudent for LP&L to enter into this arrangement; it should have been apparent to LP&L that the arrangement would result in higher fuel costs for LP&L than if LP&L had retained the LGP gas and allocated it according to the method used for all other energy sources on the Middle South system. If the energy from the LGP gas burned at Sterlington had been allocated in the manner utilized for all other energy sources on the Middle South system, LP&L's damages would have been reduced by $4,987,006, as reflected in testimony and United Exhibits 784 and 785. Therefore, the Court will allow this reduction of LP&L's alternate fuel claim.

United claims reduction of LP&L's alternate fuel claim due to calculation of United's Maximum Delivery Obligation at Ninemile Point in months when Texaco curtailed. The contract between United and LP&L provides that United's maximum daily delivery obligation is one-third of the fuel requirements of Ninemile Units 1-4, not to exceed 80,000 Mcf per day. For the period through the end of 1978, LP&L calculated United's delivery obligation as one-half of the actual fuel deliveries of Texaco, the other supplier to Ninemile Units 1-4, whose delivery obligation was to supply two-thirds of the fuel requirements. Beginning in January 1979 and continuing through December 1981, LP&L ceased to calculate United's delivery obligation based on actual Texaco deliveries and instead constructed a hypothetical delivery obligation based upon what LP&L alleges Texaco would have delivered if Texaco had not been in curtailment. The hypothetical Texaco delivery for 1979, 1980 and 1981 is substantially greater than Texaco's actual deliveries in 1977 and 1978. If LP&L's damage claim were

calculated for the years 1979-81 using one-third of the total fuel burned at Ninemile Units 1-4 as United's delivery obligation, a calculation generally consistent with the manner in which United's obligation was calculated for the years 1971-1978, LP&L's damage claim against United would be reduced by $10,819,212. The Court will allow this reduction.

LP&L concedes that additional fuel costs should be included in its calculation of damages only if the fuel cost was incurred as a result of United's curtailment and that an hourly calculation of damages would be more realistic than a monthly calculation. Generation on the Middle South system is dispatched and accounted for on an hourly rather than a monthly basis. However, LP&L has calculated fuel costs on an aggregate monthly basis which fails to distinguish between fuel LP&L would have had to burn regardless of United's curtailment and fuel that was burned as a result of United's curtailment. To eliminate this inaccuracy, United has calculated damages on an hourly basis. In doing so, United used precisely the same methodology as LP&L employed in its monthly analysis and used actual operating data rather than hypothetical figures. For the period March 1976 through February 1980 LP&L claims damages based on the monthly analysis of $52,939,889. The record reflects that during this period, $14,874,170 of LP&L's alleged damages were costs that would have been incurred even if United had not curtailed. Accordingly, the Court will allow a reduction of $14,874,170. The record does not support any further reduction in the alternate fuel costs using an hourly analysis rather than a monthly analysis.

LP&L is making a claim against United for $2,238,268 for the cost of the Phase I conversion project, undertaken in 1970 and completed in 1971, to convert Sterlington Unit 6 to burn oil. In 1969, LP&L sought and obtained an agreement from United to reduce deliveries at Sterlington because LP&L expected to be able to buy gas from other

suppliers on more favorable terms. Contrary to its expectations, LP&L was unable to obtain adequate quantities of gas from other suppliers for the Sterlington station. The Phase I conversion of Sterlington Unit 6 was designed to permit LP&L to operate the unit using oil for short periods of time. LP&L decided to undertake the Phase I conversion of Sterlington Unit 6 in the summer of 1970—before any curtailment by United—because LP&L had insufficient gas under contract from all sources to permit temporary operation of the Sterlington station at a high level of production.

LP&L is making a claim against United for $2,481,409 for the cost of the Phase II conversion of Sterlington Unit 6. The Phase II conversion was undertaken in 1974 and was expected to be completed in 1976. Its purpose was to permit the unit to burn oil on a continuous basis at full capacity. Even if United had not been in curtailment, the maximum deliveries by United under the Sterlington contract plus that available from other suppliers would not have been adequate for the Sterlington station in the 1970's. The Phase II conversion would have been necessary in any event.

LP&L is making a claim against United for $13,037,968 for the cost of converting Ninemile Units 1-3. The conversion was undertaken in 1973 and completed in 1977. These units were equipped with the ability to burn oil before conversion and did so. The conversion was designed to permit the units to burn oil at full capacity on a continuous basis.

As pointed out by the Court in its discussion of Phase I and Phase II conversion of Sterlington Unit 6, the conversion of Ninemile Units 1-3 would have been necessary in any event. Furthermore, the Court is of the opinion that this conversion process was not within the contemplation of the parties at the time of the confection of the contract, or considered as a possible element of damages

even if the contract was breached. Therefore, the Court will not allow damages claimed by LP&L for cost of converting generating facilities.

LP&L is claiming damages against United for $137,862,000 on the theory that it lost 74 megawatts of generating capacity at Ninemile Units 1-3 and Sterlington Unit 6 as a result of burning oil because of United's curtailment. LP&L measures its lost capacity by subtracting the alleged capacity of the units when burning oil ("oil capacity") from the alleged capacity when burning gas ("gas capacity"). LP&L then calculates its damage claim by multiplying the 74 megawatts allegedly lost by $1,863,000, the cost per megawatt of Waterford Unit 3, a nuclear unit currently under construction. The evidence shows that at the time LP&L entered into the Sterlington contract (1956) and the Ninemile contract (1968), it believed that the units would all be capable of reaching full capacity on oil if appropriate oil-burning equipment was installed. Waterford Unit 3 was planned in 1969, before curtailment and before capacity was lost. It was never planned as a replacement for capacity allegedly lost.

The Court is of the opinion that any loss in capacity at the Ninemile or Sterlington stations due to the burning of oil was not within the contemplation of the parties at the time of the contracts and hence any cost of such loss is not recoverable in damages. Furthermore, not only the nature or category of the claimed damages, but the extent or amount of such damages, must have been, or must reasonably be supposed to have been, within the contemplation of the parties when they entered into the contract in order for such damages to be recovered. The costs asserted by LP&L for lost capacity were far beyond the parties' contemplation, at the time the contracts were entered into, of the costs of replacing any lost capacity. For the foregoing reasons, no damages should be awarded for lost capacity.

LP&L is claiming damages for $5,126,760 for additional costs of maintaining its generating units as a result of United's alleged breach of contract. In calculating its claim, LP&L used stationwide average maintenance costs, which included maintenance costs for units not served by United.

LP&L has not met its burden of proving that it incurred any increased maintenance costs as a result of United's breach of contract. United fulfilled its delivery obligation at Sterlington under its contract from January 1, 1975. Increased maintenance costs at Sterlington after that date are not the result of United's breach of contract. After 1979, Texaco curtailments caused the vast majority of oil burned at Ninemile. Increased maintenance costs at Ninemile after that date are not the result of United's breach of contract. Any compensable damages for increased maintenance costs due to oil burning and resulting from United's breach of contract should be measured in accordance with the amount of oil actually burned and the actual additional maintenance cost associated with burning oil. For the foregoing reasons, recovery of damages for increased maintenance costs should be limited to $208,532, as reflected by the record herein.

LP&L is claiming damages against United for $1,648,481 for the alleged increase in the cost of operating Ninemile Units 1-3.

Very little oil was burned at Ninemile Units 1-3 and Sterlington Unit 6 during most years, and a great deal of the time there was no need for oil-burning personnel to be engaged in oil-burning functions. In many years, no oil was burned in some units. United fulfilled its delivery obligation at Sterlington under the contract from January 1, 1975. Increased operating costs after that date are not the result of United's breach of contract. After 1979, Texaco curtailments caused the vast majority of oil burned at Ninemile. Increased maintenance costs at Ninemile after 1979 are not the result of United's breach of contract.

Assuming there are any compensable damages for increased operating costs, LP&L's claim should be adjusted to eliminate costs that were not incurred as a result of United's breach of contract and to eliminate damages based on salary costs for personnel who were not engaged in oil burning. For the foregoing reason, damages awarded for increased operating costs should be limited to $289,676, as reflected by the record herein.

Accordingly, the Court is of the opinion that LP&L should be awarded damages under its breach of contract claim in a total amount of $40,309,142. This award includes damages of $39,810,934 for alternate fuel costs, $208,532 for additional maintenance costs and $289,676 for increased operating costs.

No damages should be awarded for conversion costs or lost capacity.

No damages should be awarded under LP&L's tort claim.

United contends that the plaintiffs are not entitled to prejudgment interest on any award of damages. The Court is of the opinion that the plaintiffs are entitled to judicial interest from the date of judicial demand until paid. With respect to the damages awarded to NOPSI and the City/Class, the Court holds that the date of judicial demand of the alternate fuel claim is the filing of the original petition, whereas the date of judicial demand of the claim for taxes is the filing of the amended petition. With respect to the damages awarded to LP&L, the Court holds that the date of judicial demand is the filing of LP&L's original petition for damages.

The City/Class and NOPSI have stipulated and agreed that the alternate fuel cost in the amount of $43,176,713 was paid by the ratepayers of NOPSI and should be returned to those ratepayers. Both the City/Class and NOPSI claim they are entitled to recover damages for increased franchise and receipts taxes in the sum of $1,226,393. The

Court will determine how much of the damages awarded to LP&L represent damages passed through to LP&L's ratepayers and therefore should be returned to those ratepayers. The Court will require the assistance of LP&L and the LPSC to make this determination.

Therefore, all amounts of damages awarded to the plaintiffs in these consolidated cases shall be deposited in the registry of the Civil District Court for the Parish of Orleans for distribution pursuant to further orders of this Court after an evidentiary hearing.

The Court will rule on such matters as attorneys fees, expert fees and other additional related costs in future appropriate proceedings.

The Court will issue further orders with respect to additional notices to the Class members upon the commencement of post-trial proceedings.

Judgment will be rendered accordingly.

New Orleans, Louisiana

August 24, 1984

(Sgd) George C. Connolly, Jr.
Judge

George C. Connolly, Jr.
Judge

A TRUE COPY

/s/ E.T. Dolese

DEPUTY CLERK CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 579-040 DIVISION "J" DOCKET NO. 4

LOUISIANA POWER and LIGHT COMPANY
vs.
UNITED GAS PIPE LINE COMPANY
and PENNZOIL COMPANY

JUDGMENT

This cause having been heretofore heard and submitted to the Court for adjudication and the Court considering the law and the evidence and for the written reasons herein filed and made part of the record:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, Louisiana Power and Light Company, and against the defendant, United Gas Pipe Line Company, in the amount of $39,810,934.00 for alternate fuel cost, $208,532.00 for added maintenance costs, and $289,676.00 for added operating costs, making a total of $40,309,142.00, together with legal interest from date of judicial demand, until paid, and for all costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the petition of intervention filed by the Louisiana Public Service Commission be recognized and that the Louisiana Public Service Commission be permitted to participate herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Louisiana Power and Light Company and the Louisiana Public Service Commission shall present evidence as to distribution of the amounts awarded herein at a post-trial proceeding.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the matter of attorney fees, expert fees and all other additional related costs be continued for further evidence in future appropriate proceedings herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the total amount of the above judgment shall be deposited in the registry of the Civil District Court for the Parish of Orleans, State of Louisiana, subject to the further orders of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all other demands herein be dismissed.

JUDGMENT READ, RENDERED AND SIGNED IN OPEN COURT AUGUST 24, 1984.

(Sgd) George C. Connolly, Jr.
Judge

George C. Connolly, Jr.
Judge

A TRUE COPY

/s/ E. T. Dolese

DEPUTY CLERK, CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

APPENDIX D

The Supreme Court of the State of Louisiana

LOUISIANA POWER & LIGHT COMPANY

VS. NO. 88-C - 0406

UNITED GAS PIPE LINE COMPANY

and PENNZOIL COMPANY

IN RE: United Gas Pipe Line Co.; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number CA-3614; Parish of Orleans Civil District Court Div. "J" Number 579-040

April 4, 1988

Denied.

LFC

JAD

PFC

WFM

JCW

HTL

Supreme Court of Louisiana

April 4, 1988

/s/ FRANS J. LABRANCHE JR.
Clerk of Court
For the Court

APPENDIX E

31 FERC [¶ 61,336]

United Gas Pipe Line Company, Docket Nos. RP71-29-003 and RP71-120-000 (Phase III)

Opinion No. 237; Opinion and Order Affirming Initial Decision

(Issued June 19, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A. G. Sousa, Oliver G. Richard III and Charles G. Stalon.

[Note: Initial Decision of the presiding administrative law judge on Proposed Tariff Provisions, issued September 14, 1982, appears at 20 FERC ¶63,070.]

Appearances

W. DeVier Pierson, Peter J. Levin, John R. Hutcherson, David J. Hill, and Terence J. Keeney for United Gas Pipe Line Company

Wm. Warfield Ross, Lewis M. Popper, and *Janet M. Robins* for Gulf States Utilities Company

Andrew P. Carter and *Terrence O'Brien* for Louisiana Power & Light Company

Clayton L. Orn for Mississippi Power & Light Company and New Orleans Public Service Inc.

Sherwood W. Wise for Mississippi Power & Light Company

Stephen M. Hackerman for Pennzoil Company

John T. Miller, Jr. for Texasgulf Inc.

Alvin Adelman for The Brooklyn Union Gas Company and Elizabethtown Gas Company

Donald R. Mintz and *Constance Charles Willems* for the City of New Orleans and Blake G. Arata, David S. Cressy and Jacob Taranto, III

Marshall B. Brinkley and Stephen G. Bullock for Louisiana Public Service Commission

Eaton A. Lang, Jr. for Mississippi Power Company

William A. Allain and *Bennett E. Smith* for *Mississippi Public Service Commission*

John F. Harrington for Texas Gas Transmission Company

Joel M. Cockrell, Glenn S. Krassen, Andrea Wolfman and *Douglas Crockett* for the Staff of the Federal Energy Regulatory Commission

[Opinion No. 237 Text]

This phase of the United curtailment proceeding[1] at its core involves consideration of whether certain exculpatory provisions in United's tariffs filed with the Federal Power Commission (FPC) and this successor agency may deny recovery of damages claimed by its direct industrial customers arising from United's curtailment and whether a revised exculpatory clause proposed by United may be adopted and made effective as of November 14, 1971.

Our focus is upon the initial decision of Presiding Administrative Law Judge Sherman Kimball, issued September 14, 1982,[2] responding to the Commission's hearing order of August 9, 1978, which delineated the scope of

[1] Phases I and II (the 1975-76 interim curtailment plan and the permanent plan) were the subject of Opinion Nos. 150 and 150-A, 21 FERC ¶61,016 (1982) and 21 FERC ¶61,224 (1982), which were vacated and remanded in part in *Mississippi Power & Light Co. v. F.E.R.C.*, 724 F.2d 1197 (5th Cir. 1984).

[2] 20 FERC ¶63,070 (1982).

the proceeding. The decision is cogent, thorough, and is affirmed with little modification.

I. Background

The initial decision contains a very detailed history of the United curtailment case which needs no elaboration. Certain facts require emphasis for an understanding of our discussion, however.

United's system gas supply became insufficient to meet its customers' requirements in 1970. Continuous curtailment of deliveries by United commenced on November 3, 1970. Tariff sheets that had been part of United's FPC approved tariffs since 1952 contained section 12.1, which authorized United to prorate (i.e., allocate) deliveries of gas to "Buyers" (meaning jurisdictional customers) without incurring liability.[3] In April 1971, United sought to broaden the protection of the exculpatory clause by filing proposed revised Section 12.1, which essentially replaced the term "Buyers" with the term "customers." The judge concluded in the initial decision before us that, by this change, United was seeking to shield itself from liability to its nonjurisdictional, direct industrial customers for failing to deliver full contract entitlements. At that time, United also proposed a new section 12.3, designed to protect United from liability under direct sales contract provisions by which United had obligated itself to pay some of its customers' costs of burning alternative fuel due to interruptions in service (substitute fuel clauses).

In two opinions, the FPC refused to accept either revision on the grounds that they were unnecessary. The FPC concluded that all contract liability would be obviated

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[3] One issue in this proceeding is whether, as the judge determined, "Buyers" means jurisdictional customers only.

by adherence to Commission curtailment orders.[4] This action was vacated by the reviewing court.[5]

The FPC reconsidered its views in Opinion Nos. 647 and 647-A [49 FPC 179, 1211] in light of the court's decision and again concluded that revisions to section 12.1 and adoption of the proposed new section 12.3 were unnecessary. It reasoned that because United was not guilty of imprudence or willful misconduct related to its curtailments, no contract liability could attach in the absence of negligence, bad faith, or wrongful conduct. The Commission also interpreted potential liability under the substitute fuel clauses, finding that liability was limited to a maximum of seven days. But this interpretation was of no consequence since the Commission also reaffirmed its opinion that United could not be liable for damages arising out of authorized curtailments in any event.

Opinion Nos. 647 and 647-A were vacated and remanded by the court in a decision which generally defined the scope of the present inquiry.[6] The court criticized the FPC for speculating about United's legal liability. It stated, in essence, that liability, if any, would be determined by the state and federal courts in which civil suits for curtailment related damages were pending. The proper inquiry, the court determined, should start from the hypothetical assumption that United is generally liable for curtailment damages and also liable for damages under the substitute fuel clauses. The Commission should then determine what effect United's proposed exculpatory clauses (if adopted) would have on removing such liability. The court focused upon the substitute fuel clauses and referred to the Commission the questions of whether the clauses were unduly

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[4] Opinion No. 606, 46 FPC 786 (1971), and Opinion No. 606-A, 46 FPC 1290 (1971).

[5] *International Paper Co. v. F.P.C.*, 476 F.2d 121 (5th Cir. 1973).

[6] *State of Louisiana v. F.P.C.*, 503 F.2d 844 (the Cir. 1974).

discriminatory, whether section 12.3, if adopted, would abrogate the clauses, and, if so, whether the result would unduly prejudice or disadvantage anyone.

Phase III was subsequently severed from the remainder of the curtailment proceeding. The issues referred by the court were refined by the Commission in an order[7] specifically limiting the scope of Phase III to seven enumerated issues:

1. Is it within the Commission's jurisdiction and authority under the Natural Gas Act to approve proposed section 12.3 as a part of United's curtailment tariff?

2. If the answer to question 1 is "yes," should section 12.3 be approved?

3. If so, what should be the effective date of such provision?

4. What would be the effect of section 12.3 upon United's potential contract liability? Specifically, would approval of section 12.3 effectively abrogate the substitute fuel clauses contained in the contract between United and certain of its customers?

5. If so, would this serve to grant any undue preference or advantage to any person or subject any person to undue prejudice or disadvantage within the meaning of Section 4(b)(1) of the Natural Gas Act?

6. Do any other of United's tariff provisions or any general or specific orders of the Commission remove or limit United's potential contract liability?

7. Would the awarding of damages for United curtailments grant the recipients thereof an undue preference or advantage in contravention of the Natural Gas Act?

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[7] "Order affirming Ruling of Presiding Judge, Granting in Part and Denying in Part Motions to Lodge, Denying Motion for Initiation of Rulemaking Proceedings and Clarifying Scope of Proceeding," 4 FERC ¶61,151 (1978).

II. The Initial Decision

As discussed below, the judge made a limited review of the facts and circumstances surrounding United's supply shortages leading to the curtailments in question. The judge correctly saw his primary duty to be to address the seven issues.

Rejecting the direct industrial intervenors' contentions that adoption of section 12.3 would involve only an exercise of Section 4, Natural Gas Act (NGA) rate jurisdiction (which does not extend to direct sales), the judge concluded that section 12.3 is not a tariff rate provision but would be part of the curtailment plan and within the Commission's NGA section 4(b)(1) jurisdiction, as contemplated by the Supreme Court in affirming the Commission's jurisdiction over curtailment of direct sales.[8] Concomitantly, he found that direct sales contract provisions imposing contact liability for its customers' costs in using substitute fuels instead of gas after November 14, 1971, would be contrary to Section 12.3, if adopted, and would be abrogated.

The judge responded to the second issue, whether section 12.3 should be adopted, by finding that it should not be approved, because, as proposed, the clause would appear to exculpate United for its own negligence or willful misconduct. Rather, he concluded that it should be revised so that United would not be protected if an action against it resulting in liability were grounded in negligence, gross negligence, or willful misconduct.

Because the court decided that the FPC made a legal error by requiring deletion of section 12.3, the judge found that establishing the effective date of a revised section 12.3 as November 14, 1971 (the date it would have become effective but for rejection by FPC Opinion No. 606 on

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[8] *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

October 5, 1971), was not prohibited. Rather, it would be an appropriate rectification of an error.

After reviewing testimony of United's and intervenors' witnesses recounting the history of the substitute fuel clauses, the judge responded to the fourth issue, by finding that approval of the appropriately modified section 12.3 would effectively abrogate the substitute fuel clauses after November 14, 1971, if the shortages were not due to United's negligence, gross negligence or willful misconduct. Moreover, to the extent United remained liable under the substitute fuel clauses, he found liability to each direct customer would be limited, under the terms of the clauses, to a maximum of seven days of substitute fuel costs.

In the judge's opinion, approval of the modified Section 12.3 and the operation of 12.1 would not grant any preference or advantage or subject any person to prejudice or disadvantage.

The issue of the effect of other tariff provisions, that is, other than sections 12.1 and 12.3, on United's potential liability required review of section 11 of United's tariff, which limits United's obligations in *force majeure* situations. The judge, found, however, that section 11 was inapplicable to curtailments.

The judge also determined that section 12.1, as originally approved in 1952, would apply only to jurisdictional customers ("Buyers"), not to the direct customers that have sued United. The revised version of 12.1, if modified to permit imposition of liability for negligent or willful misconduct and if made effective as of November 14, 1971, would preclude liability to all customers, provided that (1) curtailments were in accordance with the interim curtailment plans ordered in effect by the FPC or the Fifth Circuit and that (2) curtailments were determined by the courts not to have been the result of negligence or misconduct.

One issue raised before the judge was whether the scope of the proceeding should include findings by the Commission on United's conduct, particularly its acquisition and management of reserves and its adding more service during the period immediately preceeding commencement of curtailments.

United argued that the judge should find that shortages on its system were not attributable to its negligence or misconduct. The judge ruled, however, that the inquiry at hand was directed to the justness and reasonableness of the tariff provisions at issue. He decided that consideration of the facts and circumstances behind the shortage was appropriate only for deciding whether United should be allowed to invoke the processes of the Commission, or whether United's hands were so unclean that its submission should be denied. The initial decision left the ultimate question of the negligence of United's conduct unresolved.

Nevertheless, in the course of surveying the facts and circumstances of the shortages, the judge did identify several major areas involving action or inaction on United's part which arguably contributed to system shortages. Although refraining from weighing responsibility for the shortages, he concluded that the shortages were the result of both external factors (the well-documented nationwide shortages of gas affecting all pipelines) as well as, to some degree, United's conduct. But, he found there were no facts or circumstances to warrant withholding approval for sections 12.1 and 12.3, as revised.

In an order clarifying its August 9, 1978, order, the Commission indicated that evidence could be received concerning the nature of the claims in the damage suits pending against United. 9 FERC 61,284 (1979). Thus, the last portion of the initial decision is devoted to examining the claims and commenting on the propriety of court awards of damages, if made, based on various elements of damages sought by the plaintiffs. United's financial health also

was reviewed to ascertain the impact of the award of damages, if such were to occur. The initial decision finds that if all claims were awarded (over $1.9 billion), the amount would be approximately twice United's net assets at the time of the initial decision.

III. Exceptions to the Initial Decision

Twelve briefs were filed taking exception to the initial decision[9]; these generated nine briefs opposing those exceptions. One participant, Gulf States Utilities Company filed a notice of withdrawal after reaching a settlement in its damage suit with United in 1982.[10]

United and its former parent corporation, Pennzoil Corporation, principally attack the judge's restrictive view of the scope of the proceeding. They argue that he should have determined that from the facts and circumstances, United was not negligent or otherwise culpable; and that, therefore, the imposition of an award of damages for curtailments would be barred by United's tariff and orders of the Commission and the courts pertaining to curtailment. In short, they ask that the Commission evaluate United's management conduct relating to the development of United's shortages in this proceeding. United urges that a uniform federal standard of prudent management be formulated and applied.

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[9] Briefs were filed by United, Pennzoil Company, Gulf States Utilities Company, Texasgulf, Inc., Louisiana Public Service Commission, and Louisiana Power & Light Company. Briefs were also filed jointly by (1) City of New Orleans, Blake G. Arata, David S. Cressy, and Jacob Taranto, III, individually and as representatives of the class of electric ratepayers of New Orleans Public Service, Inc. (NOPSI); (2) NOPSI and Mississippi Power & Light Co., which were joined by Mississippi Public Service Commission and by Mississippi Power Company; and (3) Brooklyn Union Gas Company and Elizabethtown Gas Company.

[10] The amount of the settlement appears to be $112 million. 2 Moody's Public Utility Manual 3737 (1984).

The standard United suggests would involve evaluating whether management judgment was reasonable and prudent and made in good faith based on the circumstances that existed at the time the decision was made. If management decisions were imprudently made, exculpation should be precluded only if such action is directly linked to increases in curtailments.[11] United argues that, if this standard were adopted and applied in the present case, its management's actions would be found not to have increased curtailments; hence, it would be exculpated.[12]

United alleges several other errors by the judge: (1) refusing to deny as violations of the NGA any damage awards which are not based on out-of-pocket expenses, any damage awards which would duplicate already recouped expenses, anti-trust damages, and attorney fees, and many of the damage claims elements related to Texasgulf's Bully Camp sulfur extraction operation; (2) failing to find that section 12.1 applied to direct industrial customers prior to November 14, 1971; (3) finding section 11 (*force majeure*) of United's tariff not applicable to its curtailments; (4) recommending that, if damage awards have an adverse impact on United's ability to continue delivering services, subsequent proceedings should be established, rather than attempting to consider the impact in this proceeding; and

[11] United Br. on Ex. at 9.

[12] This argument, however, depends upon the Commission's assuming the task of assessing management prudence and then rejecting the judge's statements concerning several areas of facts and circumstances (*e.g.*, termination by United of gas purchase contracts in East Bastian Bay, disregard by United of warnings about reserve production ratios and reserve deliverability life in a 1968 Arthur D. Little Company Study, failure by United to be in full compliance with the regulations in reporting reserves in its Form 15 reports, use of interstate gas in the intrastate New Orleans District Five portion of United's system, and expansive sales policies by United in the mid-1960's). The judge's statements imply that United's actions in these areas are attributable to improper management decisions and have a relationship to the curtailments United's customers experienced.

(5) recommending that United be prohibited from recovering through its rates damage awards based on negligence or misconduct.

The direct sale industrial intervenors and The City of New Orleans[13] principally object to the findings that: (1) declared sections 12.1 and 12.3 (as modified) could be approved without being unduly discriminatory or prejudicing the intervenors; (2) approved the modified sections; (3) determined that the Commission has jurisdiction to approve them in a tariff that would apply to their direct industrial sales contracts; (4) concluded that the tariffs could be made applicable retroactively to November 14, 1971; and (5) concluded that awards of damages based on various elements of damages claimed by the intervenors in their damage suits would violate the NGA.

New Orleans Public Service, Inc. (NOPSI) and Mississippi Power & Light (MP&L) claim error in the judge's finding that liability under substitute fuel clauses is limited to seven days.

Louisiana Power & Light Company (LP&L) claims that the judge erroneously placed the burden on the intervenors rather than United to show the justness and reasonableness of the proposed tariff provisions.

Texasgulf objects to quoting from an FPC order of November 22, 1972,[14] which stated that Texasgulf had grossly disregarded curtailment allocation limits. Texasgulf argues that a *pro forma* statement in an ordering paragraph declaring that the order was "without prejudice to any claims or contentions which may be made by Texas gulf," was

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[13] The group of intervenors consisting of The City of New Orleans, Blake G. Arata, David S. Cressy, Jacob Taranto III, individually and as representatives of the class of electric ratepayers of NOPSI.

[14] 48 FPC 121 (1972). The order partially granted a Texasgulf petition for extraordinary relief and required payback of volumes taken by Texasgulf in excess of its curtailment allocations in 1970 and 1971.

a determination that the order would not be used against Texasgulf in any proceedings. Texasgulf claims that the initial decision violates this alleged prohibition. Texasgulf also suggests that Opinion No. 150 requires findings in this phase of the proceeding concerning when United knew or should have known that it would have to curtail firm service.

Staff presents two exceptions: (1) there should be findings that United violated Section 7 of the Natural Gas Act by introducing interstate gas into the intrastate New Orleans District 5 portion of its system; and (2) the judge used a standard of whether United had "clean hands" to determine if sections 12.1 and 12.3 should be approved. According to staff, use of this standard suggests a finding of no negligence or misconduct—a finding which is outside the scope of the proceeding and not consistent with the evidence, particularly the evidence concerning United's conduct regarding District 5 reserve releases.

IV. Discussion

A. Scope of the Proceedings

At the outset, we will consider whether the judge is correct in determining that conclusions should not be drawn concerning prudence, negligence, or willful malfeasance of United's management regarding acquisition and management of reserves and enlargement of service during the seven to ten years prior to the onset of United's curtailments.

The judge's analysis of the scope is correct. United's argument should have been raised in a request for rehearing of the August 9, 1978 hearing order.[15] In any event, we reject the argument as ill-founded. United seeks

[15] As noted by the judge, no rehearing was sought from the order of August 9, 1978, defining the scope of the proceeding. 20 FERC ¶61,070, at p. 65,288.

a decision going well beyond the limits on the scope set forth in the hearing order. It relies upon dicta from two court opinions, one of which was previously argued and rejected by the Commission in issuing the order of August 9, 1978,[16] in an attempt to convince us that there is no legal barrier to reaching ultimate conclusions on United's prudence. Both decisions recognize that the construction of exculpating tariff provisions and the reasonableness of the adoption of such provisions are in the Commission's primary jurisdiction.[17] Extrinsic evidence may be necessary to determine the meaning and the proper circumstances where the language should be applied.[18] But, neither decision suggests that, once the operation of a tariff provision has been analyzed (as the judge has done in the instant case) and the circumstances outlined in which the provisions would or would not apply, the Commission should take the next step and make as to whether United was imprudent or negligent.

To do so would be inconsistent with law of this case, which is set forth in State of Louisiana decision. In that decision, the court criticized the FPC for making ultimate conclusions on United's liability. The court emphasized that the FPC started with the wrong inquiry. Rather than concentrating on what contract damage liability should be imposed on United, the Commission on remand was directed to assume, *arguendo,* that United is liable, then determine the effect of the exculpatory clauses based on that assumption. In other words, the first step, the determination of whether United's management's actions or inactions concerning its shortages meet the elements of common-law negligence, are not for the Commission to

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[16] *Mississippi Power & Light Co. v. United Gas Pipe Line Co.,* 532 F.2d 412, 420 (5th Cir. 1976), *cert. denied,* 429 U.S. 1094 (1977).

[17] *United States v. Western Pacific Railroad Co.,* 352 U.S. 59, 63 (1956).

[18] *Id.* at 66.

make in this case. They are for the courts to decide,[19] as the judge correctly found.

United argues that the prudence of United's curtailment related conduct is analogous to the issue of prudence of purchasing practices by other pipelines which is being considered in several PGA proceedings. The present case, however, is different from a PGA case, in which the entire proceeding is devoted to determining the propriety of passing gas supply costs on to consumers. Under section 601 of the Natural Gas Policy Act of 1978 (NGPA), the Commission is given express statutory authority to determine whether a pipeline's management recklessly disregarded its fundamental duties in acquiring reserves.[20]

We cannot ignore our obligation to establish rates based upon prudently incurred costs, but we reject United's attempts to draw us into the area of deciding whether conduct leading up to curtailment was prudent. Determinations in that area would thrust the Commission into the role of making findings that would be tantamount to determining whether or not United has been negligent. This is precisely what the court said in *State of Louisiana* should not be done.

B. Facts and Circumstances

The judge decided that two reasons exist for a limited survey of the facts and circumstances giving rise to United's curtailments and the nature of the damage claims pending in the courts. First, the survey would provide a background or framework necessary to place the legal controversy in context. Secondly, it would be a basis for de-

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[19] *State of Louisiana v. F.P.C.*, 503 F.2d 844,867 (5th Cir. 1974).

[20] The Commission also has rejected the prudence standard in PGA proceedings involving the question of whether gas acquisition costs should be automatically passed on under section 601. *Columbia Gas Transmission Corporation*, 26 FERC ¶61,034 (1984), *reh'g denied*, 26 FERC ¶61,334 (1984).

termining whether United's hands were "unclean," thereby requiring its submissions (i.e., sections 12.1 and 12.3 as offered by United) to be rejected.[21]

It is our opinion that we need not determine whether United has unclean hands in order to decide this case. Such an inquiry is irrelevant if it is initially concluded that, as a matter of law, section 12.3 cannot be accepted as proposed, but must be modified to exclude exculpation for shortages, if any, in which United was culpable.

As a result of our findings below that Section 12.3 should be modified, we do not adopt as findings any statements of the judge that appear to be conclusions on the facts and circumstances giving rise to curtailment. Thus, the objections to perceived erroneous conclusions raised by the participants on this issue are moot.

C. Section 12.3

United does not take exception to the rejection of its proposed version of section 12.3 and to the adoption effective November 14, 1971, of the section modified to exclude liability except if resulting from negligence or willful misconduct.[22] The industrial intervenors do. They object to any exculpatory clause being made effective, particularly if it is retroactive to 1971. The basic argument is that this Commission does not have jurisdiction to approve an exculpatory tariff applicable to direct sales customers' claims, because the subject matter involves rates and not transportation from which the Commission's jurisdiction over curtailments is derived.[23]

The initial decision correctly indicated[24] that the Circuit Court has settled the issue by finding that section 12.3 is

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[21] 20 FERC ¶63,070, at p. 65,289.

[22] Br. on Ex. at 6.

[23] *City of New Orleans, et al.,* Br. on Ex. at 9; LP&L Br. on Ex. at 9; NOPSI Br. on Ex. at 22.

[24] 20 FERC ¶63,070, at p. 65,303-65,304.

not a tariff rate provision subject to NGA section 4(b)(2) but is part of a curtailment plan subject to approval under the standards of section 4(b)(1). *State of Louisiana v. F.P.C.*, 503 F.2d 844,867 (5th Cir. 1974). Thus, the issues surrounding section 12.3 arise under the Commission's jurisdiction over transportation, not rates. The Commission's jurisdiction over curtailment because of jurisdiction over transportation has been confirmed by the Supreme Court.[25]

The more difficult issue is whether we have the jurisdiction to approve a modified version of the original sections 12.1 and 12.3 to be effective as of November 14, 1971. The intervenors argue that the revised exculpatory clauses cannot have any retroactive effect without violating section 5(a) of the NGA, or the filed rate doctrine.[26] But, as noted by the judge,[27] our action here flows from an error in Opinion Nos. 606 and 606-A, which never became final because they were overturned on review. Under such circumstances, correction of the error is not a reparation in violation of the filed rate doctrine nor affected by the NGA section 5 limitation on prospective application of tariffs.[28]

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[25] *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

[26] The Commission may not prescribe rates to recoup past losses once a tariff containing that rate has become final. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 343 U.S. 246, 254 (1957).

[27] 20 FERC ¶63,070, at p. 65,305.

[28] The Court made this specific finding in *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 224 (1965), stating as follows:

> While the Commission "has no power to make reparation orders," *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591,618, its power to fix rates under section 5 being prospective only, *Atlantic Refining Co. v. Public Service Commission*, supra at 389, it is not so restricted where its order, which never became final has been overturned by a reviewing court . . . An agency, like a court, can undo what is wrongfully done by virtue of its

To determine whether the modified section 12.3 should be adopted depends to a large extent on whether it would provide an undue preference for United or impose undue prejudice or disadvantage to the intervenors or anyone else under Section 4(b)(2) of the NGA. The intervenors argue that adoption would deprive them of bargained-for contract rights[29] and disregard the disproportionately heavy curtailments they suffered.[30] This, however, is simply a restated version of the argument that contract entitlements are sacrosanct and should govern curtailment allocations.[31] During periods when curtailments are in effect pursuant to a Commission or court-ordered curtailment plan, it would be unduly preferential for anyone receiving less than his firm contract entitlements to be entitled to collect from United contract damages for the monetary equivalent of the shortages, irrespective of United's culpability. Awards under such circumstances would either directly (by being passed on through rate increases) or indirectly (through weakening the pipeline's financial condition) adversely affect the remaining customers of United. As a result, we do not believe that removing the alleged bargained-for right

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order.

The Court in *Callery* allowed the Commission to impose a new condition upon previously unconditioned producer certificates requiring refund of amounts already collected under the certificates, in essence *nunc pro tunc,* because the orders originally granting the certificates had been set aside upon review.

[29] Louisiana Public Service Commission Br. on Ex. at 68.

[30] LP&L Br. on Ex. at 28.

[31] The Commission's conclusion as to the superiority of the end use curtailment method (in the absence of the operation of free market forces) is generally expressed in Opinion No. 92, 12 FERC ¶61,129, at pp. 61,273 - 61,274, *aff'd Consolidated Edison Co. of New York v. F.E.R.C., 676* F.2d *763* (D.C. Cir. 1982). This conclusion also reflected in judicial decisions. *See State of Louisiana v. F.P.C.,* 503 F.2d 844,855 (5th Cir. *1974); American Smelting and Refining Co. v. F.P.C.,* 494 F.2d 925, 936 (D.C. Cir. 1974).

to collect damages for underdeliveries during curtailment periods irrespective of the pipeline's culpability constitutes an undue preference to United or an undue burden upon the intervenors.

We therefore affirm the judge's finding that section 12.3 as modified is just and reasonable and effective as of November 14, 1971.

The City of New Orleans suggests adoption of specific language for sections 12.1 and 12.3 to avoid further conflict. No party has indicated opposition to the suggestion, and we believe that the suggestion is beneficial since the proposed language makes explicit the basis on which United would be liable. Section 12.1 shall include the following language:

> Whenever a shortage of natural gas impairs Seller's ability to fulfill the requirements of Seller's customers, then Seller may in the absence of Seller's negligence, bad faith, fault or willful misconduct without liability allocate Seller's supply of natural gas. . . .

Section 12.3 will be limited similarly.[32]

D. Section 11, Force Majeure Provision

The judge found that sections 11.1 and 11.2 of United's tariff concerning *force majeure* relief do not operate to limit United's potential contract liability, for three reasons. First, he found that the operative language of the tariff sections requires that a *force majeure* event must be outside the control of the party seeking relief. United's purported notice invoking relief is its petition for a declaratory order filed on October 26, 1970, which initiated this entire proceeding. The judge found that the petition was based

[32] To avoid confusion, the term "allocate" replaces "prorate" in The City of New Orleans' proposed language. This is extended to make it clear that the gas will be allocated under United's effective curtailment plan instead of being distributed on a pro rata basis.

upon tightening supplies and rising demand, neither of which are "matters over which United had absolutely no control."[33] Secondly, he found that the petition of October 26, 1970, did not meet the notice requirements, because it did not specifically mention *force majeure* and because it was filed ten months after commencement of curtailments. Finally, the section could not exculpate United from actions grounded in negligence or willful misconduct.

United objects to these findings arguing that, under the judge's qualification for relief, section 11 would require that a curtailing pipeline have "absolutely" or "entirely" no control over its supply and demand. Since United concedes that "[i]t goes without saying that a pipeline controls some aspects of its supply and demand,"[34] it argues that, in a supply/demand imbalance such as exists during periods of curtailment, pipelines would be precluded under the judge's test from invoking *force majeure*. United also suggests that failing to mention *force majeure* in the notice would elevate form over substance. In addition, United suggests that the judge was confused as to the timing of the commencement of continuous curtailments and the filing of the October 26, 1970, petition. The petition was filed before continuous curtailments commenced on November 3, 1970.

By its terms, section 11 applies only to situations that are out of the control of the party seeking *force majeure* relief. We agree with the judge's findings that, inasmuch as United was not forced to add new customers or to increase service to existing customers, it cannot be said, in this instance, that a number of the essential ingredients of the curtailment were beyond the control of United. In any event, even if it could be said that the events in question were entirely beyond the control of United, sec-

[33] 20 FERC ¶63,070, at p. 65,310.

[34] Br. on Ex. at 165.

tion 11 would not operate to protect United from its own negligence, since it specifically precludes relief in those situations that a party may prevent "by the exercise of due diligence."

E. Substitute Fuel Clauses

In 1971, United requested a declaratory order in Docket No. RP71-99 construing certain clauses in contracts with its utility customers. The clauses provided for reimbursement of those customers for substitute fuel burned by them during curtailment periods. Contracts covering deliveries to Plant Sweatt and Plant Jack Watson of Mississippi Power Company (MPCO)[35] and a single contract with MP&L for deliveries to the Rex Brown Power Plant and the Baxter Wilson Power Plant are the only contracts still at issue.[36] The substitute fuel clause in the MP&L contract is set forth in the initial decision.[37] The operative language at issue is substantially similar for all three contracts and essentially provides that United is excused from buying substitute fuel oil during periods of impaired deliveries due to *force majeure* or proration, except for all fuel oil used "during any period of not more than seven consecutive days. . . ."[38]

The central issue is whether the phrase "any period" means a period during which the customer only receives curtailment allocations (i.e., one continuous period, since

[35] Ex. 22 and 23.

[36] Ex. 25 and 731. International Paper Company, which had similar clauses in its contracts with United, entered into a settlement agreement with United and has withdrawn from participation in Phase III.

[37] 20 FERC ¶63,070, at p. 65,306.

[38] The substitute fuel clauses provide that United will pay for substitute fuel burned under two different circumstances. One is curtailment (for seven consecutive days). The other arises when United needs the gas for peak-shaving purposes. The second circumstance is not at issue here.

United was in a continuous curtailment posture during the relevant period after November 3, 1970) or repeated seven consecutive day periods, each commencing whenever curtailment allocations received by the plants covered by the contracts are changed.

The phrase in question is ambiguous on its face and cannot be construed without resort to extrinsic evidence.

NOPSI, MP&L and MPCO argue that the judge erred in finding United responsible under the clauses for reimbursement of fuel oil costs for a maximum of only seven consecutive days of curtailment (other than when requested to take less than full entitlements by United because of peak shaving requirements).

NOPSI, MP&L and MPCO present three basic objections to these findings.[39] First, they argue that the August 9, 1978, order excluded from Phase III issues involving the construction of contracts between United and its customers, and that this would necessarily exclude as well any analysis of the substitute fuel clauses. Second, they argue that their interpretation of the clauses presented by MP&L's witness Stamply[40] is consistent with the opinion in *State of Louisiana.*[41] Finally, they argue that the clauses are part of contracts found by the Commission required in the public convenience and necessity and cannot be abrogated except "in circumstances of unequivocal public necessity."[42]

Construction of contracts in general was excluded from the scope of Phase III by the August 9, 1978 order; but the fourth question at p.3, *supra,* obviously contemplates an analysis of the rights provided by the substitute fuel

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[39] 20 FERC ¶63,070, at pp. 65,306-65,308.

[40] Tr. 16,431.

[41] 503 F.2d at 868.

[42] *Permian Basin Area Rate Cases,* 390 U.S. 747, 822 (1968).

clauses as a necessary predicate for determining the effect of Section 12.3, if adopted. This reasoning is consistent with the directive in the State of Louisiana decision that we should determine what would happen with section 12.3 in effect to United's liability under the substitute fuel clauses.[43]

MP&L's assertion that the interpretation offered its witness Stamply is compelled by the court's interpretation of the clauses in State of Louisiana is incorrect. The court made no final findings on the proper interpretation. It merely illustrated its difficulty with the FPC's discussion of the fuel clauses in Opinion Nos. 606 and 606-A and suggested that more analysis was needed to understand the language in one contract it examined.

The fact that the clauses are part of contracts incorporated in transportation certificates that were found by the Commission to be in the public convenience and necessity does not exempt them from the Commission's power to abrogate contracts as an element of the overall operation of a curtailment plan. As previously discussed, our transportation jurisdiction, which includes the power to curtail direct sales,[44] necessarily includes the power to limit the financial consequences to a pipeline that curtails such sales in the approved manner. Otherwise, pipelines would be forced into the untenable situation of being required to perform acts deemed to be in the public interest at the cost of disastrous financial consequences to themselves.

While we agree with the judge's impression of the evidence given by the various witnesses testifying concerning the extent of the clauses (noting that MPCO and MP&L present no objection other than that insufficient weight was given to their witness Stamply's testimony), additional

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[43] *Id.* at 867.

[44] *F.P.C. v. Louisiana Power and Light Co.*, 406 U.S. 621 (1972).

portions of the record not discussed in the initial decision lend additional support for his conclusion.

Mr. Stamply testified that if United supplied enough gas to meet a plant's needs and the plant did not have to burn fuel oil, then a new period of potential liability would start.[45] But, he also admitted that, under his interpretation, whether United is required to pay for fuel oil used in a given plant depends upon the generation requirements of the entire MP&L system.[46] In fact, under Mr. Stamply's interpretation, United's liability is actually controlled, not by the needs of the specific plant covered by one of the contracts in question, but by the Middle South Utilities, Inc. (Mid-South) dispatch operator who assigns generation responsibility to each MP&L unit.[47] A given MP&L unit may be assigned a high or a low generation requirement on a given day because of exigencies elsewhere on the Mid-South system,[48] such as repairs required to an LP&L generating unit caused by LP&L or some third party's negligence.

Under Mr. Stamply's interpretation, if the Rex Brown Power Plant temporarily stopped taking any curtailment allocations from United because it was down for repairs, upon recommencement of gas deliveries, even if at the same allocation level as before shutdown, a new liability period would commence under the applicable substitute fuel clause.[49] This illustrates the important point that whenever United is supplying less than full contract en-

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[45] Tr. 16,431.

[46] Tr. 16,437.

[47] Tr. 16,441. Middle South Utilities, Inc., is the holding company parent of LP&L, MP&L, NOPSI, and Arkansas Power & Light Company.

[48] Tr. 16,441.

[49] Tr. 16,448.

titlements for the entire Mid-South system, Mid-South could alter generation unit requirements throughout its system to make United continuously liable under the contracts covering deliveries to only two units.[50]

The ability of the entire Mid-South system, not merely MP&L, to structure its generation responsibility so as to control United's liability[51] is inconsistent with the testimony of MPCO's witness Bell, who stated that the clauses were "intended to provide a short range emergency fuel supply in the event of an inability of United to supply gas to *the plants under the contracts.*" (emphasis added.) Furthermore, the Stamply interpretation would allow a result completely at odds with the testimony of United's witness Porter, who stated that the seven day limitation had been adopted because United did not want to assume the unlimited liability that would be allowed by Mr. Stamply's interpretation.

We therefore affirm the finding of the judge that United's liability under the substitute fuel clauses is limited to seven days during a continuous period of curtailment.

F. Comments of the Judge on the Nature, Extent and Theory of Damage Claims Against United

The judge reviewed in detail the nature or theory of elements of various damage claims pending in the court proceedings against United. His comments were for the purpose for making sure the Commission was fully informed but were not intended to be the basis for any ultimate findings.[52] He then proceeded to discuss the ap-

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[50] Tr. 16,448; as noted by the judge, witness Bell also testified to the same effect.

[51] Although MPCO's witness Bell did not so state, it appears that the same is theoretically possible for MPCO, since it owns or has an interest in a number of plants other than those covered by the contracts in question. Tr. 14,635 and 14,366; 2 Moodys Public Utility Manual 3484 (1981).

[52] 20 FERC ¶63,070, at p. 65,313.

propriateness of the various damage claims and suggested that certain claims (e.g., damages claimed for which there has been no actual out-of-pocket expenses, treble damage claims, or claims for attorney's fees) do not have a reasonable basis and therefore would constitute undue preferences under the NGA.

In an order issued November 30, 1979, clarifying the August 9, 1978, order, the Commission stated that "a 'general inquiry' concerning the claims for the purpose of making ultimate judgment is unnecessary and unwarranted" and may conflict with matters more properly for courts to resolve.[53] Therefore, the judge's comments on the types of claims are not adopted as the Commission's findings.

As to whether damage awards contravene the NGA or our ability to carry out statutory functions, the judge proposes that, after all damage awards have become judicially final, a hearing should be initiated, if so requested by United, to determine whether payment of the damage awards would so adversely impact United that service would be impaired.

So far, United has settled four curtailment damage suits by total payments in excess of $112 million. At present, United faces recent potential judgments which could involve as much as $270 million.[54]

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[53] 9 FERC ¶61,284, at p. 61,228.

[54] On August 24, 1984, the Civil District Court for the Parish of Orleans in Louisiana entered a judgment in the amount of $44.4 million plus interest in favor of NOPSI, the City of New Orleans, the State of Louisiana and representatives of NOPSI's customers as a class. The same court also entered judgment in the amount of $40.3 million plus interest in favor of LP&L and its customers. The amount of the interest is the subject of further legal proceedings in the Louisiana courts. On June 4, 1985, the United States District Court for the District of Columbia entered a decision finding United liable to Texasgulf for negligence resulting in a breach of a long-term supply contract. The amount

It is conceivable that additional adverse judgments in the untried damage suits could, when added to existing judgments, require a review by this Commission of the proposed timing of payments to avoid adverse impact on jurisdictional ratepayers. However, consideration of the issue at this time would be premature.

The judge further recommends that any damage award based on negligence, misconduct or willful behavior be excluded from recovery through increases in United's jurisdictional rates by a Commission determination at this time. United argues that such a determination should be reserved for future rate cases. Moreover, it suggests that, if the damage awards are "bankrupting" in magnitude, the Commission would not want to have tied its hands. We agree with United and will not decide the issue at the present time since we would have to anticipate requests that may not be presented and events that may not come to pass.

The Commission orders:

(A) The initial decision issued on September 14, 1982, is affirmed in part and modified in part in accordance with this order.

(B) Proposed tariff sections 12.1 and 12.3, modified in accordance with this decision, are approved as being not unduly preferential or discriminatory and shall be effective as of November 14, 1971.

(C) United shall file revised tariff sheets in conformity herewith within 30 days of the issuance of this order.

(D) Motions of LP&L, the City of New Orleans and Texasgulf for reopening the record and of the City of New Orleans for oral argument are denied.

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of liability is to be determined later. Texasgulf seeks damages totaling $100 million.

APPENDIX F
35 FERC [¶61,344]

United Gas Pipe Line Company, Docket Nos. RP71-29-030, -031, -032, -033, -034, -035, -036 and -037 (Phase III)

Opinion No. 237-A, Opinion and Order Denying Rehearing

(Issued June 17, 1986)

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C.M. Naeve.

[Note: Opinion No. 237, Affirming Initial Decision, issued June 19, 1985, appears at 31 FERC ¶61,336.]

[Opinion No. 237-A Text]

On June 19, 1985, the Commission issued Opinion No. 237, 31 FERC ¶61,336, affirming an initial decision [20 FERC ¶63,070] on seven questions concerning the effect of tariff conditions upon the liability of United Gas Pipe Line Company (United) for damage claims arising out of curtailments.

The Opinion affirmed the following principal conclusions in the initial decision:

(1) The Commission has the authority to approve tariff clauses which would exculpate United from breach of contract claims, provided that the curtailments were not caused by its negligence or willful misconduct and that it conducted the allocation of gas in accordance with effective curtailment tariffs. The proposed exculpatory clauses (sections 12.1 and 12.3) were modified to conform and adopted effective as of November 14, 1971.[1]

[1] The effective date of other curtailment tariff provisions that were tendered for filing on May 17, 1971, in Docket No. RP71-120 simultaneously with sections 12.1 and 12.3 (as then proposed by United).

(2) The modified section 12.3 would remove contract liability for the use of substitute fuels by customers irrespective of whether the customers have substitute fuel clauses in their contracts. To the extent liability is predicated on negligence or willful misconduct, United would be liable only for a maximum of seven days of substitute fuel costs.

(3) No undue preference or advantage would be granted by adoption of modified sections 12.1 and 12.3 effective November 14, 1971.

(4) No other tariff provisions remove or limit United's potential contract liability. If curtailments are conducted in accordance with Commission orders approving curtailments plans, United would be exonerated from breach of contract claims in the absence of negligence or willful misconduct.

(5) The awarding of damages based on negligence or wrongful misconduct, as opposed to simple breach of contract due to adherence to Commission cr court-ordered curtailment plans, does not involve undue preference or advantage.

I. Requests for Rehearing

Seven requests for rehearing were filed. The request of Texasgulf, Inc., Docket No. RP71-120-035, has been withdrawn as a result of a settlement with United.

United and Pennzoil Company present essentially the same principal objection. They assert that the Commission erred by failing to determine the facts and circumstances surrounding United's shortage and to declare that the imposition of liability upon United is barred or limited by United's tariff provisions or Commission orders.

United also alleges the following additional errors:

(1) The Commission erred in failing to specify that a uniform Federal standard of bad faith rather than com-

mon law negligence should be applicable to curtailment damage suits.

(2) The Commission erroneously concluded that section 12.1 has applied to direct sale customers only since 1971 (rather than since its inception in 1952).

(3) The Commission was inconsistent and in error in finding the *force majeure* provision of United's tariff inapplicable to breach of contract claims.

(4) The Commission erroneously rejected the initial decision's analysis of damage claims against United.

United also requests clarification of certain ambiguities. United requests the Commission to state that tariff sheets conforming to Opinion No. 237 do not affect a substantive change in sections 12.1 and 12.3 as proposed by United in 1971. United also seeks declarations that its shortages were part of a nationwide gas shortage and that Commission orders implementing curtailments on United's system, as well as the curtailment provisions of United's tariff, bar liability in the absence of a showing that curtailments were due to its bad faith or malfeasance.

Mississippi Power & Light Company (MP&L), New Orleans Public Service, Inc. (NOPSI), the City of New Orleans,[2] Louisiana Power & Light Company (LP&L), and the Louisiana Public Service Commission (LPSC) argue that the Commission erred in finding that sections 12.1 and 12.3 should be revised and approved to be effective as of November 14, 1971. They argue that we are engaging in ordering reparations, which are prohibited.

Both the City of New Orleans and LPSC object to finding the exculpatory tariffs applicable to nonjurisdictional sales. They also object to deferral of the question of

[2] Collectively the City of New Orleans, Blake G. Arata, David S. Cressy, Jacob Taranto III, individually and as representatives of the Class of Electric Ratepayers of NOPSI.

whether United may recover court damages awards through its rates from jurisdictional customers.

LPSC asserts that, rather than finding irrelevant the presiding administrative law judge's discussion of the cleanliness of United's hands regarding the gas shortages, the Commission should have rejected the clean hands discussion on the basis that it involved matters beyond the scope of the proceedings. The City of New Orleans, however, argues that the Commission should find that United lacks clean hands and therefore is not entitled to any exculpation.

LPSC argues that the Commission erred in finding industrial intervenors would be granted an undue preference if the modified exculpatory clauses were not adopted. It also objects to the finding that the awarding of damages not based on negligence or willful misconduct would grant the recipients an undue preference.

Most of the matters raised in the requests for rehearing are a reiteration of arguments discussed and rejected by the initial decision or Opinion No. 237. Certain arguments warrant the additional discussion below.

II. Discussion

A. Review of Facts and Circumstances

United and Pennzoil raise two principal objections to the refusal of the Commission in Opinion No. 237 to review specific claims of mismanagement. These parties allege: (1) the decision in *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977), defined the Commission's primary jurisdiction to include a factual inquiry; and (2) the hearing order of August 9, 1978, included a review of facts and circumstances of the shortages in the scope of proceeding by accepting Part B[3] of the referral order by

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[3] Appendix A to this order.

the United States District Court for the Southern District of Mississippi.[4] Part B requested a determination of whether in light of (i) the facts and circumstances resulting in shortages on United's system, and (ii) the Natural Gas Act and rules and regulations thereunder, the imposition of liability and an award of damages are barred or limited by sections 12.1, 12.3 or any other tariff provisions or Commission orders.

These arguments are essentially efforts to seek untimely rehearing of the hearing order of August 9, 1978, establishing the scope of the proceeding. The *Mississippi Power & Light Co.* decision does not direct that the Commission determine the facts and circumstances of United's shortages. The court only stated that "the Commission can determine in detail the facts and circumstances that resulted in the severe shortage United is experiencing."[5] The court did not *require* a determination of the facts and circumstances of United's shortages. For the reasons stated in the order of August 9, 1978, the Commission found it inappropriate to make such a determination.

The Commission in that order did accept Part B of the referral order because the issues "involved matters which are within the scope of [the Commission's] primary jurisdiction." In doing so, however, the Commission did not specifically incorporate a review of the facts and circumstances. The predicate to the questions presented in Part B is "[w]hether, in light of (i) the facts and circumstances resulting in the shortage on United's system. . . ." That phrase, however, does not independently direct a determination of the facts and circumstances. Rather, it is based on the supposition that the Commission would incorporate Part A (requesting review of the facts and circumstances)

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[4] *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, No. J74-185(N)(S.D. Miss. April 22, 1977).

[5] 532 F.2d at 420.

into the scope of the proceeding, which the hearing order categorically rejected.

B. Force Majeure

United challenges our determination that *force majeure* tariff provisions do not protect it because its curtailments were not entirely beyond its control. United argues that it was not forced to add new customers or increase existing service immediately prior to the onset of curtailments. United contends that it had preexisting obligations to honor, and new or enlarged service was unavoidable.[6] United has failed to persuade us concerning the firmness of these commitments, however. Mr. Haynes, a witness for United, was unable to say whether the commitments were legal or moral.[7] In the opinion of another United witness, Mr. O'Leary, it was reasonable for United to expand sales during the pre-1969 period since other pipelines did the same. His testimony suggests that the new or enlarged sales were the result of business decisions, rather than binding, legal obligations.[8] Mr. Cassin, Vice President and General Counsel of United, also testified that the commitments were not legal matters. They were business matters. He stated that, the way the industry functioned at that time, even a simple commitment was to be honored.[9] In our view, the record contains substantial evidence to support the conclusion that United's commitments for new or enlarged service did not constitute binding, enforceable agreements. United, for its own reasons, decided to honor them anyway, irrespective of the consequences.

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[6] Tr 142-43, 722-25, 743, 3197, 4195, 4219, 18,787-88, Ex. 43 at p.-22.

[7] Tr. 743.

[8] Tr. 18,354.

[9] Tr. 3197.

C. Rejection of Judge's Analysis of the Damage Claims

The Commission refused to adopt comments by the judge on the nature of certain elements of damage claims asserted by plaintiffs against United in court suits. United argues on rehearing that our refusal is inconsistent with the clarifying order issued November 30, 1979. That order allowed reception at the hearings of evidence on the extent and nature of the private claims. The order, however, did not indicate that the purpose of receiving such evidence would be to resolve the damage claims themselves. On the contrary, the order noted only that "[t]he *potential* liability of United for damages *may* be relevant to resolution of the seven issues [set for hearing]." (Emphasis added.)[10]

Of the issues set for hearing, an examination of elements of the damage claims is related to only the issue of whether an award of damages might grant an undue preference or advantage contrary to the NGA. That issue, however, requires the broad answer given by the judge in Section VII of his initial decision that liability predicated on breach of contract (in the absence of negligence or misconduct) would be unduly preferential if curtailments were in accordance with an effective curtailment plan; but the opposite, if curtailments resulted from shortages caused by negligence or willful misconduct.[11]

Evaluation of the nature, extent and theory of the elements of the claims is a different matter altogether than the issue of undue preference or advantage issue. The former evaluation basically requires a determination of whether each element is allowable under the law of damages.

Application of the law of damages, however, is a matter for the courts. In fact, most, if not all, of the elements

[10] 9 FERC ¶61,284, at p. 61,628.

[11] 20 FERC at p. 65,312.

of damage claims of NOPSI and LP&L that United attacks have been discussed at length and denied by the court before whom the claims were tried.[12] The claims of Gulf States Utilities Company and Texasgulf, Inc., are now irrelevant since both have settled their suits with United. Evaluation of the damage claims of MP&L and Mississippi Power Company, which remain to be tried in the Federal District Court for the Southern District of Mississippi, would trench upon the jurisdiction of the court.

D. Approval of Sections 12.1 and 12.3 Effective November 14, 1971

The City of New Orleans, LPSC, LP&L and MP&L object to adoption of a modified form of the exculpatory clauses for which United sought approval in 1971. The modified clauses would not exculpate United from damages due to curtailments resulting from its own negligence or willful misconduct.

The intervenors make the following arguments against approving the modified proposed exculpatory clauses effective as of November 14, 1971:

(1) Approval of a modified section 12.1 is outside the scope of the proceeding.

(2) The Commission has no jurisdiction to make modified sections 12.1 and 12.3 applicable to direct sale customers.

(3) The Commission erred in revising the proposed exculpatory clauses and making them applicable when there is no negligence or willful misconduct.

(4) There is no showing of any public interest in exculpation for breach of contract.

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[12] *City of New Orleans v. United Gas Pipe Line Company,* Nos. 575-544 and 579-040, Docket No. 4, Slip. op. at 22-39 (Cir. Dist. Ct. Parish of Orleans, La., August 24, 1984).

(5) The Commission has no authority to make the modified exculpatory clauses effective from November 14, 1971.

(6) Adoption of the modified clauses would impose undue prejudice upon the intervenors.

(7) The approved langauge of the exculpatory clauses erroneously limits United's authority to allocate gas during shortages only in the absence of negligence, bad faith, or willful misconduct.

Included among the seven issues defining the scope of this proceeding was whether "any other of United's tariff provisions . . . remove or limit United's potential contract liability?"[13] Consideration of this issue implies modification of section 12.1 if required after an analysis of its effect. By its terms, section 12.1 would absolve United for damages even in the absence of willful misconduct, which would be inconsistent with the law and prior Commission precedent.[14]

The parties challenge the Commission's authority to revise and apply the proposed section 12.3 and the existing 12.1 on a variety of grounds. All of the grounds have been previously addressed in the initial decision or Opinion No. 237 except the assertion, in essence, that there is an insurmountable *hiatus* between the deletion of the original section 12.3 as a result of the erroneous determination of the FPC in Opinion Nos. 606 and 606-A [46 FPC 786, 1290] and our present adoption of a limited version of

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[13] *See United Gas Pipe Line Co.*, 4 FERC ¶61,151, at p. 61,355 (1978).

[14] 20 FERC at p. 65,304. The judge supports limiting exculpation by relying on *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), which established the doctrine that a common carrier may not exculpate itself for liability for negligence. The Court in *Bisso* noted that it had previously declared that public policy forbade telegraph companies from such exculpation, even though they were not common carriers. 349 U.S. at 89.

section 12.3. The intervenors claim that the *hiatus* is caused by the failure of United to seek rehearing or judicial review of Opinion Nos. 606, 606-A and 647-A (the latter two Opinions rejected a subsequent United effort to offer a revised section[15]) and by the fact that the present proposed section 12.3 was not filed until March 3, 1975, in a different docket (RP75-71). Because of these factors, the intervenors argue that Opinion No. 237 violates the prohibition on reparation orders[16] by attempting to rectify final Commission orders retroactively.

The crux of the intervenors' argument is that the Commission's erroneous decisions supposedly became "final" decisions because of United's failure to appeal and, therefore, the doctrine that the Commission may correct an erroneous but not final order does not apply.[17] United's failure to appeal Opinion Nos. 606 and 606-A cannot reasonably be viewed as disqualifying, since United had no reason to appeal if the Commission had been correct in the view that adherence to an approved curtailment plan obviated contract liability. Assignment of a new docket number by Commission personnel to a United filing containing the proposed section 12.3 was a purely ministerial matter. That act certainly cannot affect United's efforts to cure the Commission's error, once it was discovered, particularly since the new docket (RP71-120) and the original one (RP71-29) were both consolidated in this Phase III for the purpose of once more considering the efficacy

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[15] United Gas Pipe Line Co., 49 FPC 179 (1973) and 49 FPC 1211 (1973).

[16] *See, e.g., Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[17] *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392 (1965); *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223 (1965); *F.P.C. v. Idaho Power Co.*, 344 U.S. 17 (1952); *Tennessee Valley Municipal Gas Association v. F.P.C.*, 470 F.2d 446 (D.C. Cir. 1972).

of United's proposed exculpatory clause.[18] The decision in *International Paper Co. v. F.P.C.*, 476 F.2d 121 (5th Cir. 1973), vacated the "absolute defense" determination in Opinion No. 606 as *"mere dicta."* The Commission's findings in Opinion 647-A, which included a finding that there was no need for an exculpatory clause, were vacated in *State of Louisiana v. F.P.C.*, 503 F.2d 844 (5th Cir. 1974). *The State of Louisiana* decision led to the present Phase III proceeding.[19]

The argument made by some intervenors that section 12.3 cannot be made part of the court ordered plan, which was effective from November 1976 to November 1982, is also misguided. The court ordered plan involved the four-category curtailment plan approved by the Commission in Opinion No. 606, which had been interrupted by the plan adopted in Opinion No. 647 in January 1973.[20] Although the court made significant adjustments in the Opinion No.

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[18] "Notice of Filing and Order Suspending Proposed Revised Tariff Sheets, Consolidating Issues in Pending Proceeding and Scheduling Distribution of Evidence," Docket Nos. RP71-29 and RP71-120, issued May 28, 1981 (unreported).

[19] It is apparent from the *International Paper Co.* decision that the court was suggesting correction of the error by further proceedings:

> We undertake to give lengthy comment on this language so that no court in the future will be misled as to the import of this language because it was in an order upheld by this circuit. We also feel that by commenting on this language at this time we will give the FPC opportunity to further act on the matter if it so desires.

576 F.2d at 125.

Courts have held that finality of administrative actions is not a mechanistic, technical decision but rather is based upon a realistic, pragmatic assessment of the nature and effect of the orders. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *Fidelity Television, Inc. v. F.C.C.*, 502 F.2d 443, 448 (D.C. Cir. 1974).

[20] *See Southern Natural Gas Company v. F.P.C.*, 543 F.2d 530 (5th Cir. 1976).

606 plan, the court indicated that it was reimposing essentially the Opinion No. 606 plan. Undoubtedly, United's original section 12.3 would have been part of that plan but for the Commission's legal error. Thus, the revised sections 12.3 and 12.1 can be made part of the court ordered plan as easily as they can be incorporated in the other plans subsequent to November 14, 1971.

The reasoning supporting our finding that sections 12.1 and 12.3 exonerated United for breach of contract (not involving negligence or willful misconduct), are in the public interest is adequately discussed in section II of the initial decision.[21]

LP&L objects to the language of the modified exculpatory clauses. The Commission adopted language for the revised section 12.1 suggested by the City of New Orleans.[22] LP&L believes that the language could be construed as limiting United's authority to curtail to only those periods when there is an absence of negligence or willful misconduct. On July 19, 1985, United made a compliance filing in Docket No. RP71-29-037 tendering a tariff containing the language in question in a revised section 12.1. We think it is sufficiently clear from the language contained in the filing that the exculpatory provision relates only to liability and does not limit United's operational ability to effectuate curtailments. This is consistent with our intent, as expressed in Opinion No. 237-A. Further revision of the section is therefore unnecessary.[23]

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[21] 20 FERC at p. 65,304.

[22] "Whenever a shortage of natural gas impairs Seller's ability to fulfill the requirements of Seller's customers, then seller may in the absence of Seller's negligence, bad faith, fault or willful misconduct without liability allocate Seller's supply of natural gas . . ."

[23] We agree with United's suggestion that we clarify the term "allocate" as used in the sections 12.1 and 12.3 to make clear that the term has no different meaning than the terms "curtail" and "prorate" that are used elsewhere in section 12.

In making the compliance filing in Docket No. RP71-29-037, United requested an effective date of July 19, 1985, rather than November 14, 1971, as contemplated in Opinion No. 237. The basis for the request is that the Opinion effects no substantive change in United's tariff but makes explicit what has been implicit in Sections 12.1 and 12.3 since November 14, 1971. As explained in Section II of the initial decision,[24] the modification to the exculpatory clauses eliminating protection for negligent or willful acts in causing or implementing curtailments is designed to conform to the law and to be consistent with a similar provision approved in Tennessee Gas Pipeline Company's tariff in 1977.[25]

However, even if the Filed Rate Doctrine[26] is inapplicable to exculpatory clauses in curtailment tariffs (which is an open question we do not need to now address), the continuing controversy over exculpation of United from curtailment damages (including two suits pending trial before the United States District Court for the Southern District of Mississippi) suggests that our conclusions should be embodied in filed tariffs made effective as of November 14, 1971, for clarity, if for no other reason.[27]

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[24] 20 FERC at p. 65,304.

[25] *Tennessee Gas Pipeline Company,* 57 FPC 1593 (1977).

[26] The doctrine holds that only filed tariff rates may be collected by a pipeline. *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571 (1981); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246 (1951); *City of Cleveland v. F.P.C.,* 525 F.2d 845 (D.C. Cir. 1976).

[27] The D.C. Circuit has recently commented that no court has squarely decided whether the Commission's waiver power may extend backward past the original filing date absent the parties' agreement and a finding of good cause. *City of Girard v. F.E.R.C.,* No. 84-1210, slip op. at 12 (D.C. Cir. May 16, 1986). However, the court relying on the decision in *Arkansas Louisiana Gas Co. v. Hall supra,* assumed that this Commission has the power to set an effective date for a rate tariff before the new rate was filed. *Id.* at 13. In addition, section 154.51 of the

The argument that we have failed to consider prejudice to the intervenors is negated by the foregoing discussion. By causing United's tariffs to conform to existing law, we may create a preference; but, as a matter of law, the result cannot be unjust or unduly discriminatory or preferential.

Several intervenors continue to insist that United does not have "clean hands" and, therefore, is not eligible for any exoneration. We adhere of our view expressed in Opinion No. 237 that the question of "clean hands" is irrelevant to a decision in this case.

Related to the "clean hands" argument is United's request that we make more explicit that United's curtailments resulted in some degree from the nationwide shortages of gas during the 1970's. United requests confirmation that the question of its conduct to be decided by the courts is solely concerned with the extent to which its conduct increased curtailments, i.e., the amount of aggravation by United of the shortage that would have occurred in any event. The degree of United's culpability and the causal connection between fault and its curtailments are all matters which are part of the legal framework of suits arising out of curtailments. They are matters for the courts rather than this Commission.

The Commission orders:

(A) Rehearing of Opinion No. 237 is hereby denied.

(B) United's FERC Gas Tariff First Revised Volume No. 1, Revised Seventh Revised Sheet No. 71 and Revised twelfth Revised Sheet No. 72 submitted July 19, 1985, in Docket No. RP71-29-037 are accepted for filing and shall be effective as of November 14, 1971.

Commission's regulations permits a gas tariff or part thereof to be effective on less than 30 days notice, which would not prevent a curtailment tariff provision to become effective prior to its filing. We find that good cause has been shown for making the revised Sections 12.1 and 12.3 effective as of November 14, 1971.

(C) Motions for reopening the record and for oral argument are denied. Motions to lodge court judgments and status reports on litigation are granted.

Appendix A

Mississippi Power & Light Company and State of Mississippi v. United Gas Pipe Line Company and Pennzoil Company, United States District Court, Southern District of Mississippi, Jackson Division, Civil Action No. J74-185(N), April 21, 1977.

Before Walter S. Nixon, Jr., Judge.

Order

This cause having come on for hearing on the motion of the defendants to refer certain issues to the Federal Power Commission for exercise of its primary jurisdiction, and the Court having received oral and documentary evidence, having received the briefs of the parties, and having heard the argument of counsel, is of the opinion that the motion should be and it is hereby granted.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Order of April 4, 1975, be amended to provide:

(a) That there be referred to the Federal Power Commission for a full and adequate determination, articulating its rationale and supporting it with relevant findings of fact, the questions raised in this cause, including but not limited to the questions set forth in Appendix A to this Order. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.,* 523 F.2d 412, 420 (5th Cir. 1976), *cert denied,* ___U.S. ___, 45 U.S.L.W. 3571 (Feb. 22, 1977);

(b) That all further actions in this cause continue to be stayed pending the Federal Power Commission's determinations on the questions referred herein and pending completion of the following proceedings before the Federal Power Commission:

(1) *United Gas Pipe Line Co.,* Docket Nos. RP71-29 et al. (Phase II);

(2) *United Gas Pipe Line Co.,* Docket Nos. RP71-29 et al. (Phase III); and

(3) Any other proceeding which the Federal Power Commission may institute in response to this Order for the purpose of addressing the questions referred herein.
IT IS SO ORDERED AND ADJUDGED, this the 21st day of April, 1977.

Appendix A to Civil Action No. J74-185(N)

Issues to Be Referred to the Federal Power Commission

A. Issues Pertaining to the Facts and Circumstances Resulting in the Shortage on United's System.

1. Whether the shortage on United's system resulted from substantial changes in the supply of natural gas available to United and in the demand for gas on United's system that were beyond the control of United or Pennzoil and that could not reasonably have been foreseen by United or Pennzoil?

2. Whether United and/or Pennzoil deliberately or negligently created the gas shortage on United's system by making commitments for service to new customers or enlarged service to existing customers after they knew or should have known that United's existing gas reserves plus those that it could reasonably expect to acquire would not meet its system requirements?

3. Whether United and/or Pennzoil deliberately or negligently created the gas shortage on United's system by the release of any natural gas reserves under contract or by the surrender of any natural gas purchase contracts?

4. Whether United and/or Pennzoil deliberately or negligently created the gas shortage on United's system by failing to make reasonable efforts to acquire new gas reserves?

5. Whether United and/or Pennzoil deliberately or negligently created the gas shortage on United's system by precluding United from direct access or direct participation in any reserves of natural gas or by improperly prohibiting United in any other manner from acquiring new gas reserves?

6. Whether United and/or Pennzoil, during negotiations of the contract between United and MP&L dated December 8, 1967, knew that United could not fulfill its contractual commitment to MP&L and others from its existing and projected supplies of natural gas and, if so, whether United and/or Pennzoil concealed this fact from or misrepresented it to MP&L?

B. Issues Pertaining to United's Tariffs and FPC Orders.

Whether, in light of (i) the facts and circumstances resulting in the shortage on United's system and (ii) the provisions and policies of the Natural Gas Act and the Federal Power Commission's rules and regulations, the imposition of liability upon United and the awarding of damages to MP&L for the curtailments necessitated by such shortage are barred or limited by:

(a) §12.1 of United's tariff;

(b) §12.3 of United's tariff;

(c) § 11 of United's tariff;

(d) any other provision of United's tariff;

(e) the Federal Power Commission's order in Docket No. CP70-222 [44 FPC 14 (1970)] certificating the sale of gas to MP&L at its Baxter Wilson Steam Electric Station and/or at its Rex Brown Electric Station;

(f) any general or specific orders of the Federal Power Commission pertaining to United's curtailment programs?

C. Issues Pertaining to the Contract Between United and MP&L.

Whether, in light of (i) the facts and circumstances resulting in the natural gas shortage on United's system and (ii) the provisions and policies of the Natural Gas Act and the Federal Power Commission's rules and regulations, the imposition of liability upon United and the awarding of damages to MP&L for curtailments necessitated by such shortage are barred or limited by:

(a) Article XVI of the contract between United and MP&L entitled "Use of Substitute Fuel";

(b) Article XVIII of the contract between United and MP&L subjecting such contract "to all present or future valid rules, regulations or orders of any commission or regulatory body having jurisdiction";

(c) Article IX of the contract between United and MP&L entitled "Impairment of Deliveries";

(d) Article VIII of the contract between United and MP&L dealing with "Force Majeure" or

(e) Any other provision of the contract between United and MP&L.

D. Issues Pertaining to the Compensation of MP&L by Higher Priority Customers.

1. Whether and to what extent MP&L may be compensated by higher priority customers on United's system for curtailments to MP&L resulting from the shortage on United's system?

2. Assuming some such compensation is forthcoming, to what extent will it or should it bar or limit the awarding of damages to MP&L for United's curtailments?

E. Questions Pertaining to the Impact of Curtailment Damages Upon United's Rendering of Service.

Whether the awarding of damages to MP&L for United's curtailments of deliveries resulting from the natural gas shortage on United's system:

(a) Would grant MP&L an undue preference or advantage in contravention of the Natural Gas Act;

(b) Would impair United's ability to continue rendering natural gas service on its system, or

(c) Would frustrate or hamper the Federal Power Commission's ability to allocate United's limited gas supplies fairly and in accordance with the public interest?

APPENDIX G

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

No. 86-4424.

UNITED GAS PIPE LINE CO.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Aug. 18, 1987.

Petition was filed for review of Federal Power Commission order. The Court of Appeals, 503 F.2d 844, vacated and remanded. On remand, the Commission approved tariffs, stating that pipeline company was not liable for contract damages arising from deliveries of natural gas curtailed in compliance with filed curtailment plan unless company, through negligence, bad faith, fault or willful misconduct, caused need for curtailments. Pipeline company sought review and six direct sales customers and a state public regulatory body sought to intervene. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) Commission had jurisdiction to approve exculpatory tariff applicable to direct sales customers; (2) pipeline company was liable for curtailed deliveries only if it caused need for curtailments through negligence, bad faith, fault or willful misconduct; (3) exculpatory provision of 1952 tariff applied to direct sales customers only following approval of revised tariff; and (4) intervenors could not raise

issues in addition to those raised by parties filing petitions for review.

Vacated in part and affirmed in part.

Peter J. Levin, Pierson, Semmes & Finley, W. DeVier Pierson, Washington, D.C., George Frazier, C. Murphy Moss, Jr., New Orleans, La., John R. Hutcherson, Brunini, Grantham, Gower & Hewes, Jackson, Miss., for United Gas Pipe Line Co.

Joel M. Cockrell, Jerome M. Feit, Sol. F.E.R.C., Washington, D.C., for F.E.R.C.

James R. Lacey, Gen. Sol., Newark, N.J., for Public Service Elec. & Gas Co.

Clayton L. Orn, Houston, Tex., Joseph P. Wise, Jackson, Miss., for New Orleans Public Service Inc. and Mississippi Power & Light Co.

Wayne J. Lee, Michael R. Fontham, New Orleans, La., for Louisiana Public Service Comn.

Margaret Fabic, Brooklyn, N.Y., Alvin Adelman, for Brooklyn Union Gas Co. and Elizabethtown Gas Co.

Andrew P. Carter, New Orleans, La., Terrence O'Brien, for Louisiana Power & Light Co.

Stephen M. Hackerman, Houston, Tex., for Pennzoil Co.

John F. Harrington, Washington, D.C., for Texas Gas Transmission Corp.

Constance Charles Willems, New Orleans, La., Ellis Baker Murov, for City of New Orleans.

Donna J. Bailey, Birmingham, Ala., for Southern Natural Gas Co.

Petition for Review of an Order of the Federal Energy Regulatory Commission.

Before THORNBERRY,
HIGGINBOTHAM, and DAVIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Once again we review a facet of the administrative proceedings, begun sixteen years ago before the Federal Power Commission, involving United Gas Pipe Line Company's curtailment of natural gas to its customers during the nation-wide natural gas shortages of the 1970's. We review Opinions Nos. 237 and 237-A, in which the Federal Energy Regulatory Commission approved tariffs stating that United is not liable for contract damages arising from deliveries of natural gas curtailed in compliance with a filed curtailment plan unless United, through negligence, bad faith, fault, or willful misconduct, caused the need for curtailments. United seeks greater protection from liability by a standard greater than negligence and would also have us require the Commission to determine whether United in fact was culpable. Several intervenors challenge the Commission's jurisdiction to approve the tariffs for direct sales customers and challenge whether the tariffs are in the public interest. We vacate the portion of the Commission's orders determining that force majeure did not apply on the facts, then conclude that the remainder of the decisions are reasonable exercises of Commission power and are supported by substantial evidence, and affirm.

I. HISTORY

The petitioner, United Gas Pipe Line Co., is among the largest of the nation's interstate natural gas pipeline companies that sell natural gas in direct sales and in sales for resale. United owns and operates a pipeline system that extends throughout Texas, Louisiana, Mississippi, Alabama and Florida. Its major pipeline customers distribute natural gas throughout the eastern half of the United States. United also sells gas to industries, power plants, and local distribution systems.

Six intervenors, New Orleans Public Services, Inc., Mississippi Power & Light Co., City of New Orleans, Louisiana Power & Light Co., Brooklyn Union Gas Co., and Elizabethtown Gas Co., are direct sales customers of United. The seventh intervenor, the Louisiana Public Service Commission, is a state public regulatory body with statutory authority to regulate public utilities in Louisiana and to assert the interests of Louisiana's consumers of electricity.

In 1952, during temporary natural gas shortages caused by the Korean War, the Federal Power Commission approved United's tariff section 12.1, which stated, "In the event a shortage of gas renders Seller unable to supply the full gas requirements of all of its consumers, then, Seller, may, without liability to Buyer prorate its gas supply in the manner hereinafter set forth. . . ."

Around 1970, the nation experienced severe shortages of natural gas. United lacked sufficient supplies to meet its customers' needs for the winter of 1970-71 and proposed to curtail deliveries according to the priorities in its 1952 tariff. On October 26, 1970, United sought an order from the FPC declaring that United's curtailment plan complied with its tariffs and that, given section 12.1, United incurred no liability for curtailments to any customer, including direct sales customers. *See United Gas Pipe Line Co.*, FPC Docket No. RP71-29. After two days of hearings on the order, United reached an agreement with its customers, except Monsanto Co., permitting curtailments through March 31, 1971.[1]

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[1] Monsanto petitioned for review of the agreement to the District of Columbia Circuit. It also sued United in the District Court for the District of Columbia, seeking damages for breach of contract and also injunctive relief. *See Monsanto Co. v. FPC,* 463 F.2d 799, 803 (D.C. Cir.1972). The D.C. Circuit dismissed Monsanto's petition to review, but held that the district court had jurisdiction over the contract action. *Id.* at 805, 808.

In February 1971, United made a supplemental filing for a curtailment plan through October 31, 1971. In March, Louisiana Power & Light Co. sued United, alleging that the curtailment breached its contract with United and challenging FPC jurisdiction to curtail gas to direct sales customers. The district court dismissed the suit, holding that the FPC had jurisdiction of both curtailment and certification proceedings for direct sales and that Louisiana Power & Light Co. had to exhaust its administrative remedies in both. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.,* 332 F.Supp. 692, 698 (W.D. La.1971). We reversed, holding that the FPC lacked authority to curtail gas to direct sales customers. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.,* 456 F.2d 326, 333-38 (5th Cir.1972). The Supreme Court in turn reversed, holding that the FPC under its power to regulate transportation can order curtailment plans involving both direct sales and sales for resale. *FPC v. Louisiana Power & Light Co.,* 406 U.S. 621, 647, 92 S.Ct. 1827, 1842, 32 L.Ed.2d 369 (1972).

With the winter of 1970-71, other pipelines experienced shortages. Responding to a growing fuel crisis, the FPC on April 15, 1971, by Order No. 431, required all interstate pipelines either to file new tariffs containing end-use curtailment[2] plans or to establish that existing curtailment tariffs conformed to FPC policy. The FPC asserted that the tariffs would control over inconsistent provisions in all sales contracts, jurisdictional and nonjurisdictional. Order No. 431, 18 C.F.R. § 270 (1971).

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[2] In end-use curtailment, the Commission determines that certain uses of gas (e.g., use by residential customers) have a higher priority than other uses (e.g., use as boiler fuel or industrial uses). In a shortage, customers purchasing gas for inferior uses will have gas deliveries curtailed before any service to higher-priority customers is curtailed. *See American Smelting & Refining Co. v. FPC,* 494 F.2d 925, 935 (D.C. Cir.1974).

On May 17, 1971, in response to Order No. 431, United proposed a five-category, end-use curtailment plan to replace the plan it already had. Second, United proposed to modify tariff section 12.1 to make clear that it could curtail both direct sales and sales for resale without liability. United also proposed a new tariff section 12.3 intended to eliminate United's potential liability under a substitute fuels provision[3] in some of its direct sales contracts.[4] Finally, United requested the FPC to construe narrowly the substitute fuel clauses.

In Opinion No. 606, 46 FPC 786 (1971), the FPC granted interim approval to proposed section 12.1 with one change in its curtailment priorities, effective November 14, 1971. A Hearing Examiner was ordered to assess the justness and reasonableness of the curtailment scheme before final

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[3] One substitute fuels provision reads:

> If so requested by Seller at any time and from time to time, Buyer agrees that it will use Number 2 grade fuel oil purchased and supplied by Buyer, as above set forth, in lieu of gas for Buyer's fuel requirements hereunder during the period or periods of time so requested by Seller. In the event Seller is excused by reason of force majeure or proration of impaired deliveries from delivering gas to Buyer for Buyer's fuel requirements hereunder, up to the Maximum Daily Delivery Obligation then in effect, and Buyer uses Number 2 grade fuel oil for its fuel requirements, even though not so requested to do by Seller, during the period Seller is so excused from delivering gas hereunder, all such fuel oil so used by Buyer during any period of not more than seven consecutive days shall be deemed to have been used by Buyer at Seller's request.

Exhibit 23, Gas Sales Agreement Between Mississippi Power & Light Co. and United Gas Pipe Line Co., art. XVI (July 31, 1965).

[4] The proposed tariff section 12.3 stated, "[N]or shall seller be obligated to pay or credit such customers any sums with respect to substitute fuels burned by such customers during such a period of proration or interruption."

approval. The FPC rejected proposed tariff 12.3 and declined to interpret the substitute fuel clauses, reasoning those actions were unnecessary because "[i]mplementation of the curtailment plan itself, pursuant to our procedures, would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief . . . that may be initiated in the courts." 46 FPC at 805. United's customers objected to this language and sought rehearing.

The FPC denied rehearing in Opinion No. 606-A, 46 FPC 1290 (1971), explaining, "[T]he pipeline companies cannot be faced with the dilemma of providing nondiscriminatory service as ordered by the Commission and at the same time incur liability for breach of contracts which grant discriminatory preferences, directly or indirectly." *Id.* at 1293.

In *International Paper Co. v. FPC,* 476 F.2d 121 (5th Cir.1973), we reviewed Opinions Nos. 606 and 606-A and rejected the FPC's conclusion that implementation of a curtailment plan is an absolute defense against contract claims, saying the conclusion was "mere dicta and has no force other than to reflect a position taken by the FPC which lacks support in the record before it." *Id.* at 125. We also suggested "that a court which has the actual damage suit before it, and also the final FPC action, is best suited to determine the applicability of a defense recognized in contract law." *Id.* at 126 (footnote omitted). We then remanded for the FPC to state clearly its justification for its rule and to develop the necessary record to provide meaningful review. *Id.* at 129.

In a concurring opinion that greatly influenced the Commission's later rulings, Judge Brown observed that a pipeline's immunity from liability for curtailments in compliance with a federal plan is not based solely on the defense of impossibility because of an intervening government order, but is based on federal preemption. *Id.* at 131. Judge

Brown suggested that a pipeline should not be liable for its compliance with a federal curtailment plan, for such liability "would seriously impair the orderly administration of the regulatory scheme." *Id.* However, were the customers to establish that the need for curtailment was "precipitated by the pipeline's own failure to heed the signs of an impending crisis," then the analysis *"might"* be different enough to warrant imposing liability on the pipeline. *Id.* at 131-32.

Opinions Nos. 647 and 647-A

In July 1972, the Presiding Examiner made findings on the justness and reasonableness of United's curtailment plan, as Opinion No. 606 directed. In January 1973, before *International Paper Co.,* the FPC reviewed the Presiding Examiner's decision, approved some interim and permanent changes in the curtailment priorities in section 12.1, restated its view that United could not be liable for curtailments complying with a federal plan, and ordered United to delete section 12.3 as unnecessary. Opinion No. 647, 49 FPC 179, 193 (1973).

After the decision in *International Paper Co.,* the FPC reheard Opinion No. 647 and attempted to clarify its views in accordance with our recent decision. Opinion No. 647-A, 49 FPC 1211 (1973). The FPC determined that a pipeline curtailing gas in compliance with a filed curtailment plan must be exonerated from liability unless it caused the shortages through negligence, bad faith, or other wrongful conduct. The FPC agreed that it could not adjudicate contract liability, but affirmed its finding in Opinion No. 647 that United was not guilty of improvidence or willful misconduct. 49 FPC at 1220-21. The FPC held the substitute fuel clauses were not against the public interest, but expressly conditioned that holding on its interpretation that the clauses imposed liability on United for seven days only. *Id.* at 1221-22. Finally, the FPC determined that proposed section 12.3 was unnecessary. *Id.* at 1224.

In *Louisiana v. FPC,* 503 F.2d 844 (5th Cir.1974), we reviewed Opinions Nos. 647 and 647-A and again vacated and remanded the FPC's conclusions about contract liability and related tariff issues. We noted that the FPC rejected proposed section 12.3 because it determined that United was not exposed to contract liability for curtailments unless United was negligent or otherwise culpable, that United was not improvident in fact and therefore was not liable, and that the substitute fuel clauses in any event imposed liability for only seven days. We held that the proper questions were whether the proposed provision could remove general contract liability and whether the removal of liability subjected United's customers to "any undue prejudice or disadvantage." *Id.* at 867. We concluded that, because "the Commission cannot adjudicate contract liability, it should evaluate section 12.3 on the assumption that United faces possible liability—not on the assumption it is immune." *Id.* at 867-68. We also held the FPC's interpretation limiting to seven days United's liability under the substitute fuel clauses to be "without force and effect" for lack of adequate supporting reasons. *Id.* at 868.

Opinions Nos. 237 and 237-A

On remand from *Louisiana v. FPC,* the FPC on March 7, 1975, created "Phase I" of United's curtailment proceedings to establish an interim curtailment plan, while "Phase II" developed a permanent curtailment plan and considered the issues relating to United's liability and to the proposed tariff sections. Meanwhile, United resubmitted to the FPC proposed section 12.3.[5] On May 2, 1975, the FPC severed the liability issues from Phase II and created "Phase III" to examine United's liability under curtailment plans on an expedited basis. 53 FPC 1496,

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[5] Redesignated in the application as section 12.4. We will continue to refer to the provision as section 12.3 to avoid confusion.

1500 (1975). Only Phase III is involved in this petition for review. On August 20, 1975, the FPC enlarged Phase III to consider whether section 12.1 of United's tariff precludes damage claims.[6] 54 FPC 796, 799 (1975).

On August 30, 1974, Mississippi Power & Light Co. sued United and Pennzoil, United's former parent, for breach-of-contract damages totaling $160,000,000.00. The district court stayed the suit pending the FPC's exercise of primary jurisdiction. We affirmed, indicating five components of the suit in which the FPC's assistance could be significant, including determination of the facts and circumstances that caused the shortage. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 420 (5th Cir.1976).[7]

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[6] Meanwhile, Mississippi Public Service Commission petitioned the FPC for extraordinary relief on behalf of Mississippi Power & Light Co. and other Mississippi utilities, seeking compensation from the customers receiving a higher preference in United's curtailment plan in order to allocate the financial burden of curtailment among all customers. The Commission denied the petition for lack of jurisdiction to order compensation. We reversed and remanded for the Commission to consider the proposal. *See Mississippi Public Service Comm'n v. FPC,* 522 F.2d 1345, 1350-51 (5th Cir.1975), *cert. denied,* 429 U.S. 870, 97 S.Ct. 181, 50 L.Ed.2d 149 (1976).

[7] Between 1971 and 1975, several of United's direct sales customers brought suit against United in various state and federal courts, seeking to recover damages amounting to $1,973,820,622.00, which they claimed to suffer as a result of United's curtailments. United settled with Gulf States Utilities Co., which claimed over $700 million in damages, for $112 million. On August 24, 1984, the City of New Orleans and New Orleans Public Service, Inc., obtained judgment in state court against United for $44,403,106.00, and Louisiana Power & Light Co. obtained judgment for $40,309,142.00. *See City of New Orleans v. United Gas Pipe Line Co.*, Nos. 575-544, 579-040 (Civ.D.Ct.Parish of Orleans, La. Aug. 24, 1984). The Louisiana Court of Appeals recently affirmed both judgments, increasing the recovery of the City of New Orleans and NOPSI to $46,410,925.00 and increasing the recovery of Louisiana Power & Light Co. to $90,014,543.00. *See City of New Orleans v. United Gas Pipe Line Co.*, Nos. 3613-3614 (La.Ct.App. Apr. 30, 1987).

On August 9, 1978, the Federal Energy Regulatory Commission[8] issued an order identifying seven issues to comprise the scope of Phase III:

1. Is it within the Commission's jurisdiction and authority under the Natural Gas Act to approve proposed section 12.3 as a part of United curtailment tariff?

2. If the answer to question 1 is "yes," should Section 12.3 be approved?

3. If so, what should be the effective date of such provision?

4. What would be the effect of Section 12.3 upon United's potential contract liability? Specifically, would approval of Section 12.3 effectively abrogate the substitute fuel clauses contained in the contract between United and certain of its customers?

5. If so, would this serve to grant any undue preference or advantage to any person or subject any person to undue prejudice or disadvantage within the meaning of section 4(b)(1) of the Natural Gas Act?

6. Do any other of United's tariff provisions or any general or specific orders of the Commission remove or limit United's potential contract liability?

7. Would the awarding of damages for United's curtailments grant the recipients thereof an undue preference or advantage in contravention of the Natural Gas Act?

4 FERC ¶61,151, at 61,355 (1978). No party sought rehearing or clarification of this order.

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[8] On August 4, 1977, Congress enacted the Department of Energy Organization Act, Pub.L. No. 95-91, 91 Stat. 565 (1977), which created the Federal Energy Regulatory Commission and transferred to it the functions of the Federal Power Commission. *See* 42 U.S. §§ 7171-7122.

On September 14, 1982, after extensive evidentiary hearings, the Administrative Law Judge issued his Initial Decision on Phase III, 20 FERC ¶ 63,070 (1982), which the Commission for the most part affirmed on June 19, 1985, in Opinion No. 237, 31 FERC ¶ 61,336 (1985). In Opinion No. 237, the Commission affirmed the ALJ's decision not to determine whether United improvidently or negligently caused the shortage of gas, for that determination was beyond the scope of Phase III and would be conclusively determined by the courts anyway.[9]

Addressing the questions in Phase III, the Commission determined that it had authority to approve tariffs exculpating United from contract liability for curtailments to both direct sales and resale customers, provided that United did not cause the shortages through negligence or willful misconduct and that United effected the curtailments in accordance with filed curtailment plans. The Commission ordered United to refile sections 12.1 and 12.3 with modifications to reflect the Commission's standard for exculpation, and made the sections effective November 14, 1971.

The Commission held that the modified section 12.3 would remove United's liability during curtailments under the substitute fuel clauses unless United caused the shortage through negligence or willful misconduct. If United were liable, the Commission interpreted the substitute fuel clauses to mean that United would be liable only for seven days of substitute fuel costs.

The Commission further determined that no undue preference would be granted and no undue prejudice imposed by adoption of sections 12.1 and 12.3 as modified effective November 14, 1971. The Commission also held that no

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[9] Although the ALJ made findings about the facts and circumstances surrounding curtailment when analyzing whether United's proposed tariffs must be rejected because of United's "unclean hands," the Commission did not adopt the ALJ's statements as its findings.

other tariff provisions removed or limited United's potential contract liability, specifically saying the force majeure provisions in tariff sections 11.1 and 11.2 did not apply because the shortage was not completely out of United's control: United controlled aspects of its supply and demand.

Finally, the Commission repeated its position that, even in the absence of the exculpatory clauses, damages cannot be awarded for failure to deliver without a showing of fault, for the award is preempted by the federal curtailment scheme. The Commission denied rehearing in Opinion No. 237-A, 35 FERC ¶ 61,344 (1986).

On June 17, 1986, United filed in our court a petition for review of Opinions Nos. 237 and 237-A. No other party or intervenor below filed a petition for review. However, within sixty days of Opinion 237-A and within thirty days of United's petition, the intervenors filed notices of intervention.[10] Later, some intervenors filed Docketing Statements raising several issues not in United's petition for review and Docketing Statement. The Commission moved to dismiss the intervenors' additional issues for want of jurisdiction: the intervenors had not filed petitions for review within the sixty-day period and therefore were limited to those issues United raised. United moved to strike the portions of the intervenors' briefs dealing with the additional issues. We have carried the motions with this case.[11]

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[10] Public Service Electric & Gas Co., Pennzoil Co., and Texas Gas Transmission Co. also filed timely notices of intervention, and Southern Natural Gas Co. was granted leave to intervene out of time. None filed briefs and none is included in the term "intervenors" in the text.

[11] United, in its Brief in Partial Support of Respondent, also moves that portions of the briefs of City of New Orleans and the Louisiana Public Service Commission be stricken or ignored for failing to provide page references to the record for factual assertions, as Fed.R. App.P. 28 requires.

On February 7, 1987, Brooklyn Union Gas Co. and Elizabethtown Gas Co. moved for leave to file a joint reply brief. The Commission and United opposed the motion because the two intervenors did not petition for rehearing of Order No. 237 and thus do not meet the jurisdictional requirements for review. The motion has been carried with the case.

II. FERC JURISDICTION

We first decide whether the Commission has jurisdiction to approve an exculpatory tariff applicable to direct sales customers. The Natural Gas Act, § 1(b), 15 U.S.C. § 717(b), provides:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

In *FPC v. Louisiana Power & Light Co.,* 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972), the Supreme Court interpreted this statute to grant the FPC transportation authority over direct sales while withholding only rate-setting authority. *Id.* at 638, 92 S.Ct. at 1837. The Court stated that "[c]urtailment regulations are not *rate-setting* regulations but regulations of the 'transportation' of natural gas and thus within FPC jurisdiction." *Id.* The Supreme Court further observed that Congress, in section

16 of the Natural Gas Act,[12] intended a generous construction of the Commission's statutory authority to deal with its jurisdictional responsibilities. *Id.* at 642, 92 S.Ct. at 1839.

The dispositive jurisdictional question, then, is whether the exculpatory tariffs are rate-setting regulations that may not be applied to direct sales customers, or whether the tariffs are transportation regulations that may be applied to direct sales customers. In *Louisiana v. FPC,* 503 F.2d 844, 867 (5th Cir.1974), we resolved that question by explaining that "the proposed exculpatory provision [section 12.3] was part and parcel of United's proposed curtailment plan."[13] Because exculpatory clauses are "an integral part of a proposed curtailment plan," *id.,* because curtailment plans are within the Commission's transportation jurisdiction, and because the Commission has jurisdiction over direct sales in regulating transportation, it must follow that the Commission has jurisdiction to approve exculpatory clauses for curtailments to direct sales customers. *See Mississippi Public Service Commission v. FPC,* 522 F.2d 1345, 1350 (5th Cir.1975), *cert. denied,* 429 U.S. 870, 97 S.Ct. 181, 50 L.Ed.2d 149 (1976) (a proposed plan for high priority users to compensate low priority users during curtailment is part of a curtailment plan within the Commission's transportation jurisdiction).

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[12] Section 16 provides:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. . . .

15 U.S.C. § 717o.

[13] Our discussion of the federal interest later in this opinion explains why exculpatory clauses are necessary and integral to curtailment plans.

III. UNITED'S OBJECTIONS

United, recognizing that the Commission's decision leaves it exposed to liability for curtailments, seeks greater protection from liability in its petition for review.[14] Allegedly concerned about the multiplicity of judicial standards to determine fault, United argues that the Commission should have formulated a uniform federal standard to determine United's fault in causing the shortages and argues that the uniform standard should be bad faith or willful misconduct, not negligence. United would also require the Commission to determine whether United negligently caused the shortages. To avoid liability for curtailments to direct sale customers for the 1970-71 winter heating season, United asserts that the exculpation provision of section 12.1 applied to direct sales since 1952 instead of only since November 14, 1971. Finally, United asserts that the Commission lacked substantial evidence and reasoned analysis in determining that no other tariff provisions—specifically, the force majeure clause—remove or limit United's potential contract liability for curtailments.

We note that "the Commission enjoys substantial discretion in balancing the competing interests involved in natural gas pipeline regulation." *Mississippi River Transmission Corp. v. FERC,* 759 F.2d 945, 952 (D.C.Cir.1985). Thus, "[j]udicial scrutiny under the Natural Gas Act is limited to assuring that the Commission's decisionmaking is reasoned, principled, and based upon the record." *Columbia Gas Transmission Corp. v. FERC,* 628 F.2d 578, 593 (D.C.Cir.1979). "The Commission's findings of fact are conclusive if supported by substantial evidence." *Tennessee Gas Pipeline Co. v. FERC,* 809 F.2d 1138, 1143 (5th Cir.1987). Substantial evidence is "such relevant evidence

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[14] United does not challenge the Commission's determination that United is not liable for curtailed deliveries when United did not negligently cause the shortage.

as a reasonable mind might accept as adequate to support a conclusion." *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966).

A. Uniform Federal Standard

United argues that the Commission should have articulated a uniform federal standard of culpability because the lack of a uniform standard creates undue preferences for the customers obtaining damages under state standards that are more lenient than those applied to other customers in other states. United notes that the requirement of culpability to recover for curtailment damages is a federal overlay on state contract law; no common law rules of culpability exist for this complex setting. United would have the Commission allow damages only when a customer proves United's bad faith or willful misconduct, although United would accept a negligence standard if the Commission itself adjudicates whether United was negligent.

United, then, fears application by courts and juries of Commission standards. While United's argument is expressed as a quest for a uniform federal standard to avoid undue prejudice or preference to anyone, its objective is plainly a uniform requirement of greater culpability to avoid judgments against it. United's arguments are not persuasive.

1. The Need for a Uniform Standard

To determine whether the Commission should have stated a uniform federal standard of culpability, we find it useful—but not mandatory—to draw upon the test for applying federal common law in place of state law: the comprehensiveness of the federal regulation, the federal interest in the regulated subject matter, and the need for uniform results. *Pennzoil Co. v. FERC,* 645 F.2d 360, 385 (5th Cir.1981) (footnote omitted), *cert. denied,* 454 U.S. 1142, 102 S.Ct. 1000, 71 L.Ed.2d 293 (1982). First, the federal regulations are not comprehensive. Although the

Natural Gas Act and the Natural Gas Policy Act regulate much of the natural gas industry, "the federal scheme of regulation . . . is limited in its displacement of state regulatory authority." *Id.*

Second, the federal interest is to protect the federal curtailment scheme. Hence, the Commission determined that the public interest required the abrogation of contract liability based solely on compliance with a filed curtailment plan, but did not require exculpation when a pipeline causes the shortage by negligence or wrongful misconduct. That is, the Commission determined that the public interest required exculpation only when the basis for contract liability directly conflicts with the federal curtailment plan, but no more. The Commission's determination of the public interest is rational and adequately supported by reasons and findings.

We start with the proposition that the Commission may curtail deliveries of gas according to priorities it determines to be in the public interest, whether or not the priorities correspond to those created by contract. *See California v. Lo-Vaca Gathering Co.,* 379 U.S. 366, 369-70, 85 S.Ct. 486, 488, 13 L.Ed.2d 357 (1965) (pipelines cannot by contract avoid their public interest obligations once the Commission's jurisdiction attaches); *American Smelting & Refining Co. v. FPC,* 494 F.2d 925, 934 (D.C.Cir.), *cert. denied,* 419 U.S. 882, 95 S.Ct. 148, 42 L.Ed.2d 122 (1974). Clearly, then, the Commission's curtailment scheme preempts the customers' contract right to specific performance of deliveries; otherwise, the curtailment scheme would have no effect. *Cf. National Licorice Co. v. NLRB,* 309 U.S. 350, 365, 60 S.Ct. 569, 577, 84 L.Ed. 799 (1940). As the Commission determined, a federal curtailment plan would also be frustrated were a pipeline liable for damages caused solely by its compliance with the federal curtailment scheme. *See* Initial Decision, 20 FERC ¶ 63,070, at 65,304. A damage award, like an order for specific performance, enforces the abrogated contract right to deliv-

eries and creates incentives for the pipelines to resist a federal curtailment scheme. Consequently, curtailment plans may be reasonable without any compensation features. *See City of Willcox v. FPC,* 567 F.2d 394, 420 (D.C.Cir.1977), *cert. denied,* 434 U.S. 1012, 98 S.Ct. 724, 54 L.Ed.2d 755 (1978).

Furthermore, a damage award based on compliance with the federal curtailment scheme creates undue preferences for the customer receiving the award because the award directly, by being passed on through rate increases, or indirectly, through weakening the pipeline's financial condition, adversely affects the pipeline's other customers. *See* Opinion No. 237, 31 FERC ¶ 61,336, at 61,770. In essence, the award also nullifies the curtailment scheme for the party receiving damages while leaving it in force for others, creating unequal enforcement of the scheme. For similar reasons, we have determined that a utility may not be required both to comply with a validly-filed tariff and to pay money damages for the utility's compliance with the tariff alleged to violate the antitrust laws. *See Carter v. American Telephone & Telegraph Co.,* 365 F.2d 486, 495-96 (5th Cir.1966). Therefore, in the words of Judge Brown, we agree with the Commission that "[i]t would be unthinking to suggest that, having curtailed in compliance with the dictates of the FPC, . . . the Pipeline could thereafter be held accountable for its compliance." *International Paper Co.,* 476 F.2d at 131.

On the other hand, if compliance with a filed curtailment scheme in all cases protects a pipeline from liability, a pipeline could contract to deliver more gas than it knows it is able, relying on the federal curtailment scheme to immunize it. Thus, incentive for prudent management would be undermined. Consequently, it is not in the public interest to exculpate a pipeline from its own negligence or willful misconduct. *See Tennessee Gas Pipeline Co.,* 57 FPC 1593, 1600-01, 1603-04 (1977). We note that the Commission's determination of when exculpation serves the

public interest comports with the reasoning of Judge Brown in *International Paper Co.*, 476 F.2d at 131-32, and of the D.C. Circuit in *Monsanto Co. v. FPC*, 463 F.2d 799, 808 (D.C.Cir.1972). Also, the Commission's determination accomodates the public interest in contract enforcement by narrowly limiting exculpation to that necessary to the integrity of curtailment plans.

Third, uniformity of result is needed only to protect the federal interest, that is, only to exculpate United from contract liability in all cases not based on United's fault. Uniformity of exculpation beyond those cases is not a matter of federal concern, for liability then does not create incentives for United to resist a federal curtailment scheme. Rather, liability flows only from United's mismanagement in causing the shortage of gas, creating incentives for United to manage properly its gas supply and demand. Thus, the Commission acted correctly in approving the tariffs if the tariffs will uniformly exculpate United from liability based solely on failure to deliver contract quantities of gas.

2. The Sufficiency of Uniformity

United's arguments that the Commission erred in not adopting such a uniform federal standard suffer from several flaws. Most important, the Commission *has* articulated a uniform federal standard of liability: United is liable for curtailed deliveries only if it caused the need for curtailments through "negligence, bad faith, fault, or willful misconduct." This standard uniformly means that a customer must establish United's negligence or greater misconduct in causing a foreseeable shortage in order to recover damages. Although United has expressed concern that courts may read "fault" to mean a level of culpability less than negligence (such as strict liability or breach of a good faith duty), we note that "fault" is generally considered "the equivalent of negligence," *see Continental Insurance Co. v. Sabine Towing Co.*, 117 F.2d 694, 697 (5th Cir.1941),

and that such definition of "fault" is the only definition consistent with the Commission's statements that a customer may recover only for United's negligence or willful misconduct. *See, e.g.,* Opinion No. 237-A, 35 FERC ¶ 61,344, at 61,791; Initial Decision, 20 FERC ¶ 63,070, at 65,304-05. Any standard of fault less than negligence is preempted by the federal standard in this setting.

United suggests that the Commission's standard is not uniform because it draws on state law as applied by juries and courts rather than by the Commission itself. Because no state common-law rules exist to define the culpability needed for contract liability once a strict breach-of-contract standard is displaced, United argues that states will pick and choose among several possible standards, some imposing liability for negligence, others for bad faith. Consequently, customers suing in one state may recover while a customer suing under another state's laws on the same facts will not.

We are not persuaded that the states' limited ability to choose among various standards of culpability undermines the federal interest in enforcing its curtailment priorities. Were a state to apply a standard of culpability less than negligence, that standard would directly conflict with the Commission's jurisdictional determination of the public interest and would be void under the supremacy clause, U.S. Const. art. VI, cl. 2. As we have already stated, only uniformity in that area is necessary to the curtailment scheme. In the unlikely event a state requires a standard of culpability higher than negligence, that choice does not implicate the federal interest. Rather, the risk of liability in those cases comes from United's culpable causation of the shortage, not from compliance with the federal curtailment scheme. Any variations in state law that are not preempted thus do not create undue preferences of federal concern.[15]

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[15] United points to the state court judgment in *City of New Orleans*

United also suggests the Commission's standard lacks uniformity and creates undue preferences because state definitions of negligence vary. Thus, United requests the Commission to define what constitutes negligence for a pipeline operating under federal regulations. We note that negligence is generally defined as the failure to exercise reasonable care, that is, the degree of care which a person of ordinary prudence would exercise in the same or similar circumstances. *See, e.g, Pampas v. Cambridge Mutual Fire Insurance Co.,* 169 So.2d 200, 201 (La.App.1964). United has not persuaded us that the several states deviate so much from this definition as to undermine the exculpation necessary to protect the federal curtailment priorities. Any variation in result that does not undermine the federal curtailment plan is not of federal concern, and therefore creates no *undue* preference.

Admittedly, the term "negligence" is plastic in the hands of some courts, but the federal interest is implicated only when a proffered label of negligence or other label assertedly fault-based in fact imposes liability for curtailed deliveries when curtailment was not reasonably foreseeable and avoidable. The point is that, whether addressed as an issue of causation or liability, states are not free to attach consequences to curtailed deliveries that United with reasonable efforts could not have foreseen and avoided. A state's use of the labels "negligence" or "fault" thus does not necessarily satisfy the federal standard.

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v. United Gas Pipe Line Co., Nos. 575-544, 579-040 (Civ.D.Ct.Parish of Orleans, La. Aug. 24, 1984), *aff'd as modified,* Nos. 3613-3614 (La. Ct.App. Apr. 30, 1987), as an example of a state court picking its own standard of culpability, one allegedly less than negligence. While we recognize that United may have legitimate concerns about the state court's treatment of federal preemption, burden of proof, and breach of good faith duty to provide gas "whatever the cost," we have no basis for concluding other than that the Louisiana Supreme Court will enforce the federal standard and we express no opinion about the case.

We pause to emphasize this point because we are well aware that liability in contract and liability in tort are kindred spirits and blend together at their edges. For example, defining the pipeline's duty of care as derived from the contract obligations and defining the breach of the duty as negligent failure to perform is indistinguishable from the preempted contract standard in two entangled ways. First, of course, is the definition's failure to require proof that the lack of performance did not satisfy a standard of objective reasonableness. Second, liability under the improper definition does not rest on a showing that the objectively unreasonable acts proximately caused nondelivery.

Our use of *proximate* rather than producing cause is intentional to highlight the element of foreseeability inherent in the federal standard. If the need for curtailment was not reasonably foreseeable, imposition of liability for curtailments does little to encourage prudent management. However, it does a great deal to encourage the curtailing pipeline not to curtail to its firm customers, thus undermining end-use curtailment. Therefore, proof of foreseeability is a necessary element of the Commission's standard.

We also note that the federal standard imposes on customers claiming damages the burden to prove United's negligence or wrongful misconduct in causing the shortages. *See International Paper Co.*, 476 F.2d at 131-32 (Brown, J., concurring) ("[I]f *a customer* could prove this element of 'bad faith' on the part of the pipeline," liability "might" be proper (emphasis added).). A contrary rule, one placing on United the burden to prove its lack of negligence or willful misconduct, would undermine the federal interest. The contrary rule permits customers to rely on a presumption of United's liability based solely on United's failure to deliver the contract quantities of gas. That the customers' prima facie case and possible judgment may rest on this rebuttable presumption is inconsistent with the Commission's determination that liability

may not rest solely on failure to deliver contract quantities of gas.[16]

Finally, United suggests that undue preferences are created by the Commission's decision to permit juries and courts to determine what constitutes negligence. In other words, United argues that uniformity in the negligence rule does not mean uniformity of result. Wary of the courts' ability to adjudicate negligence in complex fact settings, United would have liability rest on bad faith in order to ensure uniform results.

United's argument forgets that the risk of varying results in a fault-based inquiry comes from the Commission's displacing the risk allocated in United's contracts. While the displacement of contract risk is necessary to enforce the federal curtailment scheme, the displacement of fault-based liability is not. Indeed, results may not be uniform. But that lack of uniformity affects only United's incentives to manage prudently its supply and contract obligations. It does not affect the incentives to comply with the federal curtailment scheme. We also note the same potential for lack of uniformity exists under any standard, including the bad faith standard United would have the courts apply. Whatever variations may exist in applying the state negligence standard in accordance with this opinion, they are not undue. Furthermore, to the extent United is concerned that some of its actions taken under Commission supervision and determined to be in the public interest may become the basis of liability when evaluated by a court or jury, United is already protected under case law. *See Chicago & Northwestern Transportation Co. v. Kalo Brick &*

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[16] Certainly, United has the burden of establishing the defense of impossibility of performance because of an intervening government order. Nevertheless, the standard of exoneration in the tariffs is not a defense, but is a federal standard of liability that preempts inconsistent state law standards. *See International Paper Co.*, 476 F.2d at 131 (Brown, J., concurring).

Tile Co., 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981) (state's determination of reasonable service requirements that conflict with federal agency's determination of reasonable service requirements is invalid). Having already limited state contract law by exculpating United from strict breach-of-contract suits during curtailments, the Commission was correct to leave adjudication of negligence to the courts.

In sum, "[n]ot all parties injured as a result of the necessity to react quickly to the natural gas crisis can be made whole." *Hercules, Inc. v. FPC,* 552 F.2d 74, 89 (3d Cir.1977). As the D.C. Circuit stated:

> The difficult problem of balancing competing equities and interests has been given by Congress to the Commission with full knowledge that this judgment requires a great deal of discretion Accordingly, it is not the role of the courts to second guess the Commission's judgment because we think we could devise a better solution than that which the agency has adopted so long as the agency's determination has a rational basis. *Gulf Oil Corp. v. FPC,* 563 F.2d 588, 608 (3d Cir. 1977). We find such a rational basis in the orders presently under review.

Arizona Electric Power Cooperative, Inc. v. FERC, 631 F.2d 809, 802 (D.C.Cir.1980).

B. Agency Determination of Culpability

United argues that the Commission's refusal to make findings about United's culpability in causing the shortage was arbitrary and capricious. We disagree.

United is procedurally barred from challenging the scope of Phase III in this appeal. On August 9, 1978, the Commission issued an order expressly defining the seven issues comprising the scope of Phase III.[17] None includes the

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[17] The seven issues are seth forth in Part I of this opinion.

determination of United's culpability or the circumstances surrounding the shortages. Rather, the order specifically rejected a request to determine those facts because "such questions pertain primarily to the issue of United's possible contract liability to its customers for curtailment damages rather than to issues related to the establishment of United's curtailment plan." 4 FERC ¶ 61,151, at 61,350. Evidence relating to United's culpability or to the circumstances of the shortage was admitted only as it related to the justness and reasonableness of the tariffs. *Id.* at 61,356. United's challenge to the scope of Phase III should have been raised in a request for rehearing and clarification of the August 9, 1978, order. No one sought rehearing of the order. Therefore, United's argument may not now be raised. *See Placid Oil Co. v. FERC,* 666 F.2d 976, 980 (5th Cir.1982). In any event, the argument is without merit.

The Commission has provided valid reasons for not determining United's liability. First, the determination of United's culpability is not inevitably relevant to the Commission's regulation of curtailment: the Commission orders curtailment schemes regardless of the culpability of the curtailing pipeline. Thus, the Commission can reasonably conclude that it is not authorized to determine the facts of the shortages. Expertise in an area is not tantamount to statutory authority to act in all aspects of that area.

Second, contrary to United's assertions, our cases indicate that the Commission need not determine these facts. In *Louisiana v. FPC,* 503 F.2d 844, 867 (5th Cir.1974), we repeated our position in *International Paper Co.,* 476 F.2d 121, 126 (5th Cir.1973), that "the Commission cannot adjudicate contract liability." The Commission correctly reads these opinions as denying it binding adjudicatory power over United's culpability and as requiring it to assume culpability in analyzing the effect of the proposed tariffs on United's liability.

The result is not changed by *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir.1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1109, 51 L.Ed.2d 541 (1977), in which we upheld the stay of an action for breach of contract damages until the FPC exercised its primary jurisdiction to resolve various issues related to curtailment plans. We mentioned that "the Commission's informed opinion" on the facts and circumstances surrounding the shortage "will be of material aid to the district court in the resolution of the damage action." *Id.* at 420. This statement does not require the Commission to adjudicate culpability. Indeed, were the Commission to adjudicate United's liability, its adjudication of that essentially state common-law issue would seriously implicate article III, *see Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 105 S.Ct. 3325, 3334-35, 87 L.Ed.2d 409 (1985), and the parties' seventh amendment right to a jury trial, *see Curtis v. Loether*, 415 U.S. 189, 194-95, 94 S.Ct. 1005, 1008-09, 39 L.Ed.2d 260 (1974). Consequently, the Commission's findings would be, at best, advisory. Thus, the Commission did not arbitrarily and capriciously refuse to determine United's culpability or the facts surrounding the gas shortage.

C. Effective Date of Tariffs

United argues that the Commission erred in holding that the exculpatory provision of section 12.1 of the 1952 tariff applied to direct sales customers only since the revised section 12.1 received interim approval effective November 14, 1971.[18]

The exculpation clause in section 12.1 of the 1952 tariff authorized proration of gas during times of shortage "without liability to Buyer." While recognizing that the 1952

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[18] United does not challenge the approval of section 12.3 effective November 14, 1971, nor that section 12.1 as modified is effective since November 14, 1971.

tariff nowhere defines "Buyer," the ALJ determined that "Buyer" did not refer to direct sales customers. The ALJ's decision is supported by substantial evidence. First, the word "Buyer" is used throughout the tariff in other contexts that can apply only to resale customers and not direct sales customers. Second, United's contracts with direct sales customers made no reference to the tariff; some contained a separate "impairment of deliveries clause" that did not provide for exculpation during curtailments. Third, the Commission did not assert jurisdiction to order curtailments to direct sales customers until July of 1971, and the Supreme Court did not uphold that jurisdiction until 1972. It is unlikely that a tariff filed in 1952, long before the Commission asserted curtailment jurisdiction over direct sales, was intended to apply to direct sales.

The evidence to which United points does not change our conclusion. The ALJ was free to disregard the interested testimony of United's past president that the 1952 tariff applied to direct sales customers. Further, the fact that the tariff contained a system of curtailment priorities that included the direct sales customers does not establish that the exculpation clause applied to direct sales customers. In the curtailment priority provision, the direct sales customers are specifically identified by how they use the gas. Only the word "Buyer" identifies the entity against which the exculpation clause applies.

Nor do we consider the ALJ's interpretation of "Buyer" to conflict with a previous FPC order or with the Supreme Court's decision in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972). On July 2, 1971, the Commission ordered United to comply with the curtailment priorities in its tariff by preventing certain direct industrial customers from taking gas in excess of the volumes allocated them under the curtailment program United had filed with the Commission. *United Gas Pipe Line Co.*, 46 FPC 21 (1971). The order did not

hold that the exculpation clause in section 12.1 applied to direct sales customers. It held only that United was bound by its own tariffs and their curtailment priorities.

Louisiana Power & Light Co. is also inapposite. While the Supreme Court upheld the jurisdiction of the Commission to apply curtailment plans to direct sales customers under the 1952 tariff's priority scheme, and while it follows that the Commission has jurisdiction to exculpate United from liability to direct sales customers as part of the federal curtailment plan, it does not follow that the Commission *exercised* that jurisdiction in approving the 1952 tariff. The Commission first exercised its jurisdiction to approve exculpatory clauses applicable to direct sales customers when it gave interim approval to United's proposed section 12.1, which applied to all "customers" effective November 14, 1971.

D. Force Majeure

Finally, United argues that the Commission erred in determining that the force majeure clause in tariff section 11[19] did not limit United's potential contract liability.

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[19] Section 11 of United's tariff states:

11.1 *Definition of "Force Majeure"*—The term "force majeure" as employed herein shall means acts of God, strikes, lockouts or other industrial disturbances, acts of public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage of accident to machinery or lines of pipe, the necessity for making tests, repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome. . . .

11.2 *Limitations on Obligations*—In the event of either Buyer or Seller being rendered unable wholly or in part by force majeure to carry

The Commission offered three reasons that the force majeure clause does not limit United's liability for curtailments. First, the Commission determined that United's petition of October 26, 1970, did not satisfy the tariff's notice requirements. Section 11.2 required United to give "notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on." The Commission determined the notice was untimely because the petition was filed some ten months after curtailment began. United objects to this finding because the petition was filed several days before the curtailments related to Phase III began. However, United has not suggested that the *cause* for the Phase III curtailments was different from the cause for the earlier curtailments. The tariff required notice as soon as possible after the occurrence of the *cause* for inability to deliver gas. The Commission's decision of untimeliness is within its authority to determine tariff compliance and is supported by substantial evidence.

The Commission also determined that the petition did not give adequate notice of the force majeure. The petition refers only to the curtailment provisions in section 12. It does not state that it gives notice of force majeure, nor does it refer to section 11. The few references in the petition to the gas shortage, then, cannot fairly be said to notify the customers that United is invoking its force majeure clause. Again, the Commission's determination is supported by substantial evidence.

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out its obligations under the Service Agreement, other than to make payments due thereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch.

Second, the Commission interpreted section 11 to mean that force majeure "would not exculpate United from actions grounded in negligence or willful misconduct." Initial Decision, 20 FERC ¶ 63,070, at 65,310. The applicability of section 11 therefore "is restricted to a situation where United's conduct has been above reproach." *Id.* The Commission's interpretation of the tariff is within its authority and is rational. Any curtailments caused by United's negligence or willful misconduct are within United's control and could have been avoided by the exercise of due diligence. Thus, force majeure, by its definition, would not apply.

Third, the Commission determined that force majeure did not apply on these facts because "United was [not] forced to add new customers or to increase service to existing customers." *Id.* Supply and demand management were within United's control, the Commission determined, and therefore force majeure did not apply to the curtailments. We vacate this third reason for the Commission's determinations regarding the force majeure clause. As in the case of sections 12.1 and 12.3, it is improper for the Commission to adjudicate actual liability. In all other instances, the Commission did not make findings of fact regarding the cause of the shortage. It made only those findings necessary to interpret the tariffs or to determine whether the tariffs were in the public interest. It is inconsistent to treat the force majeure question differently. The courts adjudicating the contract actions will determine what the causes of the shortage were and whether they were beyond United's control.

IV. INTERVENORS' OBJECTIONS

The intervenors support the Commission against United's arguments. They also level three attacks on the Commission's decisions. The intervenors first argue that the Commission lacked jurisdiction to make the revised exculpatory provisions of sections 12.1 and 12.3 applicable to direct

sales customers. The intervenors also argue that the Commission erred in determining that sections 12.1 and 12.3, as revised, serve the public interest, create no undue preferences, and cause no undue prejudice. Finally, the intervenors argue that the Commission erred in making sections 12.1 and 12.3 effective November 14, 1971. In addition, Mississippi Power & Light Co. contests the Commission's construction of the substitute fuel clauses.

The Commission asserts that we lack jurisdiction of the intervenors' issues that United did not raise, for the intervenors did not file petitions for review within sixty days after Opinion No. 237-A. The Commission also asserts that Mississippi Power & Light Co. failed to raise its additional issue in its Docketing Statement. Finally, the Commission reminds us that Brooklyn Union Gas Co. and Elizabethtown Gas Co. failed to petition for rehearing of Opinion No. 237. United supports the Commission against the intervenors. We address the Commission's jurisdictional challenges.

V. APPELLATE JURISDICTION

Section 19 of the Natural Gas Act states the jurisdictional prerequisites to review the Commission's orders:

> (a) Any person . . . aggrieved by an order issued by the Commission . . . may apply for a rehearing. . . . The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. . . . No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. . . .
>
> (b) Any party to a proceeding . . . aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals . . . by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the

> order of the Commission be modified or set aside in whole or in part. . . . Upon the filing of such petition such court shall have jurisdiction . . . to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.

15 U.S.C. § 717r(a)-(b). Each of the statutory requirements must be satisfied for the court to have jurisdiction; we are not given "any form of jurisdictional discretion." *Boston Gas Co. vs. FERC,* 575 F.2d 975, 979 (1st Cir.1978). Furthermore, the Federal Rules of Appellate Procedure apply to our review of agency orders. *Miller v. United States Postal Service,* 685 F.2d 148, 149 (5th Cir.1982), *cert. denied,* 461 U.S. 916, 103 S.Ct. 1898, 77 L.Ed.2d 286 (1983).

A. Failure to Petition for Rehearing

The Commission opposes the motion of Brooklyn Union Gas Co. and Elizabethtown Gas Co. for leave to file a joint reply brief on the grounds that both failed to petition the Commission for rehearing of Opinion No. 237. Brooklyn and Elizabethtown argue that the jurisdictional requirement is satisfied so long as *any* of the participants in the court proceeding raised the objection in a petition for rehearing to the Commission.

The plain language of section 19 requires that the very party seeking judicial review must raise its objections in its own petition for rehearing to the Commission:

> Use of the definite article in the last quoted sentence ("in *the* application for rehearing," instead of "in *an* application for rehearing") makes it plain that what is referred to is the same application for rehearing mentioned earlier in subsection (b), which in turn (by reason of the same use of the definite article) clearly refers to the same application for rehearing mentioned

> in subsection (a), to wit, the application *of the party who seeks judicial review.*

ASARCO, Inc. v. FERC, 777 F.2d 764, 773 (D.C.Cir.1985). We join the D.C. Circuit in rejecting the contention that the jurisdictional application-for-rehearing requirement is satisfied so long as any other party raised the objection. Consequently, Brooklyn Union Gas Co. and Elizabethtown Gas Co. have failed to satisfy the jurisdictional requirements necessary for us to consider their objections to the Commission's orders.[20] We therefore deny the Brooklyn Union Gas Co. and Elizabethtown Gas Co. leave to file a joint reply brief.

B. Failure to Petition for Review

A second jurisdictional requirement is that each party seeking review of an order must file, "within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part." 15 U.S.C. § 717r(b). The Commission has moved to dismiss the intervenors' issues for want of jurisdiction because the intervenors did not file petitions for review within the sixty-day period. United has moved to strike all portions of the intervenors' briefs dealing with the additional arguments because, as the Commission argued, the intervenors failed to comply with section 19 and also because the intervenors failed to comply with Fed.R.App.P. 15 and Local Rule 15. The intervenors respond that they may properly raise additional issues through their notices of intervention, that a petition for review is not required. Alternatively, they argue that their notices of intervention should, on the facts of this case, be treated as petitions for review.

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[20] The other intervenors complied with the requirement in section 19 to raise on review only those issues for which each intervenor sought rehearing before the Commission.

1. Intervention and Additional Issues

Section 19 of the Natural Gas Act does not expressly state that intervenors in a review proceeding may not raise issues additional to those raised by the parties filing petitions for review. Nevertheless, Federal and Local Rules of Appellate Procedure, as well as case law, establish that intervention does not satisfy the Natural Gas Act's requirement for a "written petition praying that the order of the Commission be modified or set aside in whole or in part." Consequently, in a proceeding under the Natural Gas Act, we do not have jurisdiction to consider intervenors' issues that are in addition to those raised in petitions for review.

Fed.R.App.P. 15 governs review of agency orders. Fed.R.App.P. 15(a) provides that a party seeking review of an agency order "shall" file a "petition for review" with the clerk of the court of appeals. Rule 15(a) also provides that "[t]he petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed."[21] Fed.R.App.P. 15(d) also permits intervention if the person desiring to inter-

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[21] The Rules provide a suggested form for petitions for review:

PETITON FOR REVIEW OF ORDER OF AN AGENCY, BOARD, COMMISSION OR OFFICER

United States Court of Appeals for the ____Circuit.

A.B.,
Petitioner

v. Petition for Review

XYZ Commission,
Respondent

A.B. hereby petitions the court for review of the Order of the XYZ Commisson (describe the Order) entered on ____, 19 ____.

S. ____________
Attorney for
Petitioner.

____
(Address)

vene, within thirty days of the date on which the petition for review is filed, files with the clerk of the court of appeals and serves on all parties a motion for leave to intervene. The form of the motion differs from that for a petition for review and must "contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought." Although Fed.R.App.P. 15(d) does not expressly state that intervenors are limited to the issues raised in petitions for review, Fed.R.App.P. 15(a) quite plainly mandates that "[r]eview of an order . . . *shall be obtained* by filing" a petition for review in compliance with Rule 15(a) (emphasis added).

Furthermore, Fed.R.App.P. 15(a) states that the petition for review must be filed "within the time prescribed by law," while Fed.R.App.P. 15(d) states that the notice of intervention "shall be filed within 30 days of the date on which the petition for review is filed." By defining the time for filing a petition for review with reference to the statute providing for review of the agency's orders, the Rule indicates that the petition for review in Fed.R.App.P. 15(a) is the only proper form to seek review of agency action. In contrast, by specifying a separate time limitation for the filing of notices of intervention, the Rule indicates that a notice of intervention is not a petition praying for review within the meaning of the applicable statute.

Our Local Rule 15 reinforces this conclusion by making clear that only parties filing petitions for review may state which issues are to be raised for review. Local Rule 15.3.4, which controls the Docketing Statement, provides that "all parties *filing petitions for review* shall file a joint Docketing Statement which shall . . . [l]ist each issue to be raised in this review" (emphasis added). Local Rule 15.3.4 also provides that "[e]very petitioner *who files for review* after a Docketing Statement has been filed shall specify *in the petition for review* any exceptions taken *or additions* to the issues listed in the Docketing Statement" (emphasis added). In contrast, intervenors may not specify additional

issues. Rather, they must specify in the notice of intervention only "any exceptions taken to the issues listed in the Docketing Statement."

The intervenors try to avoid the clear meaning of Fed.R.App.P. 15 and Local Rule 15.3.4 by pointing to Local Rule 15.3.3, which governs intervention and states:

> *Party.* A party to a Commission proceeding may intervene in a review of the same proceeding in this court by filing a notice of intervention in the docket assigned to the petition for review of any order entered in such proceeding. The notice shall state whether the intervenor is a petitioner who objects to the order or a respondent who supports the order. *A notice of intervention shall confer petitioner or respondent status on the intervening party as to all proceedings in the docket* (emphasis added).

The intervenors argue that this rule confers on them all the rights of those filing petitions for review, including the right to raise additional issues.

The intervenors' interpretation asks too much of Local Rule 15.3.3. If Local Rule 15.3.3. means what intervenors assert, the language in Local Rule 15.3.4 allowing parties filing petitions for review to list additions to the issue in the Docketing Statement, but allowing parties filing notices of intervention to specify only "exceptions taken" to the issues in the Docketing Statement, would be meaningless. The more consistent interpretation is that Local Rule 15.3.3 confers on intervenors full ability to participate as petitioners or respondents for those issues that the parties filing petitions for review list in the Docketing Statement. Thus, intervenors' status as petitioners or respondents extends, as Local Rule 15.3.3 states, "to all proceedings *in* the docket," but not to add issues to the docket.

A contrary interpretation of intervenors' ability to raise additional issues would create an unnecessary conflict be-

tween section 19 of the Natural Gas Act and Fed.R.App.P. 15. Section 19 requires that the petition to modify or set aside the Commission Order be filed within sixty days of the order on rehearing. Fed.R.App.P. 15(a) sets the time for filing a petition for review in accord with "the time prescribed by law," in this case, the sixty-day requirement of section 19. Fed.R.App.P. 15(d), in contrast, permits the filing of motions to intervene "within 30 days of the date on which the petition for review is filed." If we permit an intervenor to raise additional issues for review, we contravene the sixty-day filing limit in section 19 by permitting filings as late as 90 days after the order on rehearing to seek modification or setting aside of the Commission's orders.[22]

If, to cure this conflict with the time limits in section 19, we require notices of intervention to be filed within sixty days of the Commission's order on application for rehearing, then we have effectively amended Fed.R.App.P. 15(d) to require notices of intervention to be filed "within the time prescribed by law," as Fed.R.App.P. 15(a) states, instead of "within 30 days of the date on which the petition for review is filed," as Fed.R.App.P. 15(d) actually states. These anomalies are avoided by our holding that intervenors in a proceeding to review FERC action may not raise issues in addition to those raised by parties filing petitions for review. Thus, interventions will not implicate section 19's jurisdictional time limits, nor require a modification of Fed. R.App.P. 15(d)[23]

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[22] The ninety days is reached when a petition for review is filed on the sixtieth day after the order on application for rehearing, as Fed.R. App.P. 15(a) provides, and the notice of intervention is filed 30 days later, as Fed.R.App.P. 15(d) provides. Since our practice has been at times to grant motions for leave to intervene out of time, as we did for Southern Natural Gas in this case, the jurisdictional time limitation in section 19 could be further eroded.

[23] Our holding also ensures that all parties seeking review will raise

Although no case has addressed the precise jurisdictional issue before us, we agree with the Seventh Circuit's decision in *Illinois Bell Telephone Co., v. FCC,* 740 F.2d 465 (7th Cir.1984), in which the court granted petitioner's motion to strike portions of an intervenor's brief attacking a portion of the FCC order that the petitioners had not challenged. The Seventh Circuit stated:

> The Association was entitled to intervene in this proceeding because it has an interest in the outcome. See 28 U.S.C. § 2348. But it was not entitled to intervene for the purpose it did, that is, to challenge rather than defend the order. If it had wanted to challenge the order it had to file a petition for review, or a cross-petition within 14 days after the filing of the first petition for review; it could readily have done either, since it was a party to the proceeding before

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their issues in time to comply with the deadlines for filing Docketing Statements, thus ensuring timely notice to all parties of the issues on appeal and of each party's posture with respect to the issue. Local Rule 15.3.4 provides that all parties filing petitions for review must file a Docketing Statement "[w]ithin 30 days of the initial petition for review, but not later than 10 days after the expiration of the period permitted for filing a petition for review." Plainly, this deadline can be met only if all parties raising issues have filed their petitions before 70 days from the order on application for rehearing.

The Clerk of this Court informed the parties that the Docketing Statements were due on August 26, 1986, ten days after the expiration of the sixty-day period for filing petitions for review. United complied with the deadline, although under our reading of Local Rule 15.3.4 its Docketing Statement was due July 16, 1986, on the thirtieth day of the filing of the initial petition for review. The intervenors, on the other hand, flouted both Local Rule 15.3.4 and the clerk of the court by filing Docketing Statements late or not at all.

While we are inclined to dismiss the intervenors' extra issues for failing to docket their issues timely, *see International Merger & Acquisition Consultants, Inc. v. ARMAC Enterprises, Inc.,* 531 F.2d 821, 825 (7th Cir. 1976), we shall dispose of their issues on jurisdictional grounds and admonish these parties to comply with the proper deadlines in the future.

> the agency. This is the rule for appeals from district courts, see Fed.R.App.P. 4(a)(3); *Martin v. Hamil*, 608 F.2d 725, 730-31 (7th Cir.1979), as well as for review of decisions of administrative agencies, see Fed.R.App.P. 1[5](a); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 573 n. 2 (1st Cir.1978); 9 Moore's Federal Practice ¶ 204:11[2] (2d ed. 1983).

740 F.2d at 477. Thus, intervenors in FERC review proceedings are bound by the issues raised in the petitions for review. With regard to the issues raised in the petitions, intervenors may fully argue for or against the Commission's position. However, the intervenors may not challenge aspects of the Commission's orders not raised in the petitions for review.

The intervenors cite to *United States Steel Corp. v. EPA*, 614 F.2d 843 (3d Cir. 1979), as authority that an intervenor may raise additional issues. In *United States Steel Corp.*, U.S. Steel timely petitioned for review of an EPA order and Scott Paper Company timely filed a motion seeking leave to intervene after the time to petition for review had passed. After U.S. Steel obtained dismissal of its petition for review, the Third Circuit permitted Scott Paper Co. to continue to press its claims, even though Scott had not timely filed a petition for review. We do not read *United States Steel Corp.* as support that intervenors may raise issues in addition to those raised in petitions for review, for Scott Paper and U.S. Steel both challenged "the EPA limitations on the sulphur content of fuels in southeastern Pennsylvania" as stated in 40 C.F.R. § 52.2020(c)(18). *United States Steel Corp.*, 614 F.2d at 844. The opinion does not suggest that Scott Paper raised issues U.S. Steel did not raise, but suggests only that U.S. Steel did not adequately represent Scott Paper's interests. *See id.* Furthermore, unlike the statute authorizing review in *United States Steel Corp.*, section 19 of the Natural Gas Act confers jurisdiction in this court only over those ob-

jections that the petitioner asserts in its application for rehearing and reasserts in its petition for review. That is, our jurisdiction attaches only to those aspects of the order properly challenged, and not to the whole order. Under section 19, each party seeking review of an issue must independently establish our jurisdiction to review the issue.[24]

The cases intervenors cite from the D.C. Circuit are also inapposite. In *New South Media Corp. v. FCC,* 644 F.2d 37, 38 (D.C. Cir.1981), the court recognized what we recognize already in Local Rule 15.3.3: a party with standing to appeal may instead intervene in an appeal brought by another party to the proceeding. However, *New South Media Corp.* did not address whether the intervenor was therefore limited to the issues raised in the other party's appeal. In *California Public Broadcasting Forum v. FCC,* 752 F.2d 670, 682-83 (D.C.Cir.1985), the court *granted* the FCC's motion to strike the portions of the intervenor's brief challenging the FCC's order. The court rested on the fact that the FCC "had no opportunity to respond since [the intervenor] filed its brief *after* the FCC (to the schedule of an intervenor in support of the FCC)," and because the intervenor's "notice of intervention was inadequate to allow these arguments to be fairly introduced." *Id.* at 683. It was in its reliance on notice instead of procedure that the D.C. Circuit's reasoning differed from the Seventh Circuit's. *See id.* at 683 n. 10. Finally, although we are persuaded that the decisions of the Third and D.C. Circuits are distinguishable, to the extent they are not, we join the Seventh Circuit's decision in *Illinois Bell Telephone Co.*

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[24] Nor do considerations of "judicial economy and prompt disposition of litigation" suggest a different result. In this circuit, multiple petitions for review do not create docket confusion because "[a]ll petitions for review and other documents concerning Commission orders in the same number series (*i.e.*, 699, 699A, 699B) shall be assigned to the same docket in this Court." Local Rule 15.3.2.

2. Notice of Intervention as a Petition for Review

The intervenors argue that, despite their filing notices of intervention, we should treat their notices as petitions for review. Specifically, the intervenors assert that they complied with the Natural Gas Act because they filed notices within sixty days of Opinion 237-A and because the notices indicate an intention to seek review of the Commission's orders in whole or in part. Thus, the intervenors would have us divorce section 19 and Fed.R.App.P. 15, overlook the intervenors' deviations from Fed.R.App.P. 15 and Local Rule 15, and address the merits of the additional issues.

While we are unclear about our purported power to treat a notice of intervention as a petition for review, we decline to do so here. We cannot divorce the Federal Rules from this case, because we held that the written petition required in section 19 is the petition for review governed by Fed.R.App.P. 15(a), not a notice of intervention under Fed.R.App.P. 15(d).

Even setting aside the formal differences in the contents of petitions for review and notices of intervention, other problems remain. By identifying themselves as petitioners, the intervenors were expected to align themselves with the party petitioning for review. In no issue, however, are the intervenors aligned with United. In fact, the intervenors are aligned with the respondent on all of United's issues. Admittedly, the obvious notice problem may be cured in the Docketing Statements. Here we have the additional complication that the intervenors' Docketing Statements—assuming *arguendo* that intervenors may file Docketing Statements[25]—were not timely filed. Finally, Local Rule 15.1 requires payment of a $65.00 fee at the time

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[25] Local Rule 15.3.4 makes clear that intervenors cannot file Docketing Statements. They may only indicate "any exceptions taken to the issues listed in the Docketing Statement."

of filing the petition for review. No fee is required for notices of intervention, and intervenors have not paid or tendered the fee for petitions for review.

In sum, we are not persuaded that intervenors' notices of intervention should be treated as petitions for review, even if we in our discretion could do so.[26] Because intervenors failed to satisfy the jurisdictional requirements of section 19 of the Natural Gas Act, the motion of respondent, Federal Energy Regulatory Commission, to dismiss the additional issues raised in intervenors' Docketing Statements and to limit the issues on appeal to those raised by the sole petitioner, is granted. For the same reasons, the motion of United to strike those portions of the briefs of New Orleans Public Service, Inc., Mississippi Power & Light Co., Louisiana Public Service Commission, Louisiana Power & Light Co., and the City of New Orleans that challenge the Federal Energy Regulatory Commission's orders under review here is granted.[27]

VI. CONCLUSION

In sum, we vacate that portion of the Commission's orders that determined that force majeure did not apply on the facts.

In all other respects, the orders of the Commission are affirmed. VACATED in part, and AFFIRMED in part.

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[26] We note that Mississippi Power & Light's challenge to the Commission's interpretation of the substitute fuel clauses must be dismissed regardless of our decision on jurisdiction, for MP & L failed to raise the issue in its Docketing Statement. We also note that the substance of the intervenors' first argument has been rejected anyway in our discussion of Commission jurisdiction.

[27] Because of our disposition of the intervenors' issues, United's motion to strike portions of the briefs of the City of New Orleans and the Louisiana Public Service Commission for failure to provide page references to the record is no longer relevant to the outcome of the case, and is therefore denied.

APPENDIX H

§717. Regulation of natural gas companies

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

§717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at

once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(June 21, 1938, ch. 556, § 4, 52 Stat. 822; May 21, 1962, Pub. L. 87-454, 76 Stat. 72.)

§717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall enage in the transportation or sale of natural gas, subject to the jursidiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the

issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisions contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted there-

under such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area

The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall

conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

(June 21, 1938, ch. 556, § 7, 52 Stat. 824; Feb. 7, 1942, ch. 49, 56 Stat. 83; July 25, 1947, ch. 333, 61 Stat. 459; Nov. 9, 1978, Pub. L. 95-617, title VI, § 608, 92 Stat. 3173.)

§717*o*. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 21, 1938, ch. 556, § 16, 52 Stat. 830.)

§ 717r. Rehearing and review

(b) Review of commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken,

and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-968

UNITED GAS PIPE LINE COMPANY,
Applicant,

v.

LOUISIANA POWER AND LIGHT COMPANY, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 2, 1988.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 21st day of June, 1988.